NOWRAN BEGAM MOHAMED SALIFF v. NANTHA KUMAR DEVAR SANGARAN & ANOR; CTRM AVIATION SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA J
[SUIT NO: 22NCVC-1280-10-2012]
27 MAY 2016

TORT: *Negligence – Duty of care – Breach – Dependency claim – Student pilot (deceased) died in air crash during solo flight – Weather conditions – Whether ought to be paramount consideration before deceased could be cleared to embark on solo flight – Whether death due to human error – Whether defence of volenti non fit injuria applicable to defendants – Whether defendants could exclude liability by virtue of disclaimer/exclusion clause in deceased's application form*

TORT: *Negligence – Duty of care – Doctrine of res ipsa loquitur – Applicability*

CIVIL PROCEDURE: *Third party proceedings – Indemnity – Contribution from third party – Whether third party had to obtain insurance coverage for personal injury of trainee pilots – Whether there was valid contract between third party and defendants – Whether indemnity or contribution could be claimed in absence of valid contract*

The plaintiff's claim against the defendants was an estate and dependency claim based on ss. 7 and 8 of the Civil Law Act 1956 arising from a cause of action in negligence. The plaintiff was the mother and administratix of the estate of one Mohamed Ihsan ('deceased') who passed away in an air crash. The deceased was a student pilot who was training at the second defendant's flying club ('club') and specifically under the instructions of the first defendant, an assistant flying instructor ('FI') with the club. On the day of the air crash, the deceased embarked on two return flights from Sungai Besi to Ipoh. The first return flight took off from Sungai Besi at 10am on 29 October 2009, whereas the second return flight took off from Sungai Besi at 2pm on 29 October 2009. The first flight was a dual flight which the first defendant piloted-in-command with the deceased and the second flight was, however, a solo cross-country flight piloted-in-command by the deceased himself, in which, the deceased faced bad weathers. It was the plaintiff's case, *inter alia*, that the air crash that caused the deceased's death was due to the negligence of the first defendant as servant, agent and/or employee of the second defendant in the management and/or control of the aircraft and/or the management and conduct of the flying lessons of the deceased. The plaintiff submitted that since the deceased was only trained to fly in Visual Flight Rules ('VFR') conditions, the weather forecast for the day of the air crash ought to have been a paramount consideration in determining whether the deceased could be cleared for a flight. The plaintiff further submitted that

it would have been prudent for the first defendant and the club to disallow the deceased from embarking on his solo flight during unfavourable weather conditions. Over and above the instances of breaches of duty of care, the plaintiff also raised the plea of *res ipsa loquitor* and averred that the facts of the air crash speak for themselves as being an occurrence, which could not normally happen without negligence by the first and second defendants. On the other hand, the defendants contended that the death of the deceased was the result of 'human error' and sought to rely on the defence of *volenti non fit injuria* since the deceased understood that flying was a risky activity and had signed a disclaimer/exclusion in his application form not to take any action whether by himself or by his administration or estate against the defendants for injury or death. The defendants argued that weather was unpredictable and conditions may change abruptly. The defendants contended that it was precisely for this reason that VFR rated student pilots were instructed to turn back, *ie*, make a 180° turn when meeting sudden inclement weather or when flying into thick clouds that hamper visibility. Further, the defendants instituted third party proceedings against the owner of the aircraft ('third party'), alleging that the third party bears responsibility, amongst others, to obtain insurance coverage for trainee pilots of the second defendant who used the aircraft for training purposes. The third party, however, averred that contractually the second defendant would have to take its own insurance policy to cover such events.

Held (allowing plaintiff's claim with costs; dismissing defendant's third party proceedings):

(1) The defendants owed a duty of care to the deceased to provide a safe flying environment for him, notwithstanding that the activity of flying is intrinsically dangerous. The defendants also owed a duty to ensure that the training given to the deceased was conducted according to the approved syllabus and/or the requirements of the Department of Civil Aviation ('DCA'). It was is reasonably foreseeable that if the deceased was authorised to fly solo in adverse weather conditions, he would come into contact with clouds and in such condition, unless the deceased has been given the appropriate training, he would not have the requisite expertise to navigate away from the bad weather. (para 22)

(2) Proximity was also established by virtue of the relationship of the first defendant, second defendant and the deceased. The operations manual, rules and bye-laws of the club was a contract between the club and its members and the members *inter-se*. Therefore, it was just and reasonable for a duty to be imposed on the defendant. The defendants also, at all times, had control and management over the training of the deceased as a student pilot. The second defendant had by its

representations in the club's brochure and the stipulations in the operations manual covenanted to provide training to the deceased in accordance to the requirements of the law and its very own high safety standards. There also exists a close proximal relationship wherein the defendants would be liable in the event of injury or death to their students if reasonable care were not exercised to ensure that the standards that are expected of the defendants are not kept and/or are breached. Thus, it was reasonably foreseeable that the defendants owed a duty of care to all their students, including the deceased, while undergoing flight training at the club. (paras 23 & 27)

(3) At the time of the air crash, weather conditions were unfavourable for flying in Visual Flight Rules ('VFR') conditions. The very bad weather was supported by the meteorological forecast for the relevant aerodromes along the flight path. If low clouds and unfavourable weather, actual or forecasted before take off, would hamper visibility to below the required distance, a VFR rated student pilot such as the deceased ought not to be cleared to fly in such condition. Further, it was not within the discretion of the first defendant to determine whether the deceased could manage a solo cross-country flight in unfavourable weather conditions. The operations manual specifically provides for minimum weather conditions to be met before a student training flight takes off. (paras 32-34)

(4) The evidential tilt showed that it was more probable than not that the first defendant did not have the weather reports for the day before he cleared the deceased to fly solo and that itself would be breach of the defendants' duty of care owed to the deceased. Even if the first defendant had obtained the weather report for the day, the act of clearing the deceased to fly solo was in breach of his duty of care to the deceased. The operations manual specifically provides for minimum weather conditions to be met before student-training flights can take off. It is the duty of the defendants to ensure that the stipulations in operations manual were strictly adhered to. (paras 38 & 39)

(5) Even if the deceased had been instructed and advised to do a 180° turn if he entered clouds, or to change course towards the coast and fly along the coast when visibility is hampered, such manoeuvres would not have been possible as the deceased did not have the necessary skill and was inexperienced to take these manoeuvres in such adverse weather conditions. When entering clouds in such adverse weather, the deceased would be spatially disoriented, and it is highly likely that the deceased would not survive a crash that may ensue from such conditions. The first defendant, as the instructor who had the

management and control of the deceased's training, should have anticipated this possibility and should not have authorised the solo flight in such adverse weather conditions. Having put the deceased in this wholly avoidable situation, it was not open to the defendants to now argue that the deceased ought to have turned back or changed the flight path and fly along the coastline. (paras 43 & 44)

(6) The operations manual ('P3') had been further breached by the first defendant and the second defendant. Each return flight to Ipoh from Sungai Besi was scheduled to take two hours. Records showed that the deceased had flown with the first defendant in the morning at 10am to Ipoh and back; and thereafter he embarked on a solo return flight to Ipoh at 2pm. Therefore, in total, the deceased trained for more than two hours, the maximum student training time per day. Thus, when the first defendant cleared the deceased to fly solo, which was the deceased's second flight for the day to and from Ipoh, it was a clear breach of this provision in P3. (para 45)

(7) The Civil Aviation Regulations 1996 disentitles an assistant flight instructor ('AFI') from authorising a student's first solo cross-country flight. However the club's regulations go beyond that to state that only a FI may permit a student to fly solo. Therefore, it was clear that the requirements of the club *vide* P3, were even more stringent than the Civil Aviation Regulations itself. The first defendant, who was in charge of training the deceased, was only an AFI with the club, and not a FI. As such, even if the fateful flight was the deceased's second solo cross-country flight, the first defendant would still be negligent in failing to comply with the stipulations in the operations manual that an AFI who could not clear and/or authorise the deceased to take off on a solo cross-country flight. In the circumstances, the first defendant, being an AFI, had breached the statutory provisions of s. 9(b) which falls under Part B of the Eight Schedule (Regulation 41), Civil Aviation Regulations 1996, when the first defendant cleared and authorised the deceased to fly a solo flight. (para 61)

(8) The plaintiff had clearly established the fact that the deceased found himself in a state of spatial disorientation because of the adverse weather conditions with thick clouds, that condition led to the air crash and his eventual death. The plaintiff had also established that the defendants had control and management of the deceased's flight training and the flight was cleared for take-off upon their authorisation. The facts spoke for themselves and showed that the air crash would not have happened if not for the negligence of the defendants. In such circumstances, the doctrine of *res ipsa loquitor* was applicable and the defendants would then have to negate negligence on their part. (para 67)

(9) The defendants had failed to discharge their onus of proving that the death of the deceased was not caused by negligence on their part. By arguing 'human error', the defendants attribute blame unto the deceased for flying into clouds and not making a 180° turn or to divert from the flight path towards the coast and fly following the coastline. Such suggestions were not only inappropriate in the circumstances of overwhelming evidence of negligence, but it was highly insensitive and callous. (para 68)

(10) The primary duty of a court of law is to uphold the sanctity of contracts which the parties have entered and to enforce promises that the parties had made, provided that they were not opposed to public policy and/or were not prohibited by statute. The exclusion clause, when construed in the manner advocated by the defendants, would be in contravention of s. 29 of the Contracts Act 1950, in that it absolutely restricted the deceased and his estate from enforcing his/their rights under or in respect of the contract. The present action for negligence arises from the contractual nexus and proximity between the second defendant and the deceased, and in that sense would be a right in respect of that contract. Thus, the exclusion clause would be void under s. 29 of the Contracts Act 1950. (paras 77 & 78)

(11) As the general rule, *volenti* requires that the defendant demonstrate that the plaintiff had full knowledge of the nature and extent of the risk which he is alleged to have assumed and had voluntarily consented to the same. In pleading the *volenti* defence, the defendants stopped short of particularising (i) the facts of which the deceased was fully apprised of the risk that gave rise to the injury or death; and (ii) that the deceased voluntarily undertook to be responsible for the risk. This by itself would be a fatal flaw in the defendants' plea of *volenti*. The fact that the defendants' defence was devoid of such particulars, was a clear indication that the second defendant did not fully apprise the deceased of the risk of flying, in particular the risk of death from flying into clouds in a VFR flight condition. (paras 82 & 83)

(12) Although the deceased signed a disclaimer/exclusion in his application form where he undertook not to take any action against the club if death or any injury befalls him in the course of his flying activities, this was not indicative of the fact that the deceased was fully apprised of the risk of flying in any circumstance and that he voluntarily undertook responsibility for all risks that may arise in any circumstance. It was not reasonable to expect the deceased to have known of the danger posed by flying VFR in such adverse conditions. It is precisely for this reason, that the operations manual and Regulations impose the onus and responsibility on the trainer/instructor, *ie*, the first defendant, to ensure that the weather (current or forecast) was suitable for a trainee pilot to fly VFR. (para 86)

(13) The exclusion clause relied on by the defendants was inoperable to exclude liability arising from negligence. The wordings in the clause were too general. Upon a strict construction, the clause did not seem to exclude liability for negligence of the defendants. The clause merely states that if death were to result from flying he or his estate will not make any claims in respect of that death. The important fact is that the clause did not specifically seek to include death that results from the negligence of the defendants. In such circumstances, the ambiguity must be resolved in proferens against the defendants who sought to rely on the clause. Similarly, the terms of the present exclusion clause were not wide enough to cover the kind of breach that had occurred in this case, *ie*, gross negligence on the part of the defendants that led to the death of the deceased. As such, the defendants had failed in their defence. (para 94)

(14) Instead of training the deceased in accordance to the requirements of the operations manual and the applicable Regulations, the first defendant had 'enhanced the negligence' of the club in failing to provide a safe environment for the deceased, who was not only a member of the club but a paying student and had themselves created or enhanced their negligence by failing to ensure that the deceased was sufficiently trained to embark on his solo flight in adverse weather conditions. Thus, the *volenti* defence must fail. (paras 87 & 90)

(15) There was no duly executed written contract between the second defendant and the third party. There were a series of negotiations between the second defendant and the third party wherein the third party had made known its position that it would not be procuring insurance coverage for personal injury to trainee pilots of the second defendant, and that it would be the responsibility of the second defendant to procure such a policy. Following these negotiations, a draft lease agreement was prepared. The second defendant whist not having executed the draft agreement had nevertheless taken delivery of the aircraft, and started having use of the same. The act of acceptance of a contract may be either by words or by conduct or it may be partly by words and partly by conduct. Thus, in law the second defendant would by conduct be deemed to have accepted the terms of contract and would be bound by the terms of the final draft lease agreement. Therefore, the defendants had failed to establish their case against the third party for indemnity. (paras 107, 109, 110 & 114)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Alderslade v. Hendon Laundry, Ltd [1945] KB 189 ***(refd)***

Allied Bank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Amanah Raya Bhd v. Jerneh Insurance Bhd [2005] 2 CLJ 393 CA ***(refd)***

Arnica Corporation Sdn Bhd v. Robert Teo Keng Tuan & Anor & Other Appeals [2015] 1 LNS 1220 CA ***(refd)***
Artic Building And Civil Engineering Sdn Bhd v. Ahmad Zaki Sdn Bhd & Ors [2009] 1 LNS 403 HC ***(refd)***
Brogden v. Metropolitan Railway Co (1877) 2 App Cas 666 ***(refd)***
Canada Steamship Lines Ltd v. The King [1952] AC 192 ***(refd)***
Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***
CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2006] 2 CLJ 409 CA ***(refd)***
Chan Chin Min & Anor v. Lim Yok Eng (Lawful Mother Of Gan Swee Hock, Deceased) [1994] 3 CLJ 687 SC ***(refd)***
Cheng Bee Teik & Ors v. Peter Selvaraj & Anor [2005] 2 CLJ 839 CA ***(refd)***
Chin Choon v. Chua Jui Meng [2005] 2 CLJ 569 CA ***(refd)***
CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***
City Car Rentals & Tours Pte Ltd v. Sim Jwee Kiat [1988] 1 LNS 2 HC ***(refd)***
Eastern Shipping Company Ltd v. Quah Beng Kee [1924] AC 177 ***(refd)***
Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors [2001] 3 CLJ 864 CA ***(refd)***
EMS Bowe (M) Sdn Bhd v. KFC Holdings (M) Bhd & Anor [1999] 6 CLJ 513 HC ***(refd)***
George v. Eagle Air Services Ltd and Others [2009] 1 WLR 2133 ***(refd)***
Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal [2004] 1 CLJ 797 CA ***(refd)***
Jordan Saw Yu Huan v. Low Suan Chuan & Ors [2012] 1 LNS 1069 HC ***(refd)***
Lau Sieng Nguong v. Hap Shing Company Ltd [1969] 1 LNS 80 FC ***(refd)***
Lee Geok Theng v. Ngee Tai Hoo & Anor [2000] 1 LNS 220 HC ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
Mat Abu Man v. Medical Superintendent, General Hospital, Taiping & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC ***(refd)***
Mat Jusoh Daud v. Sykt Jaya Seberang Takir Sdn Bhd [1982] CLJ 366; [1982] CLJ (Rep) 562 HC ***(refd)***
Matang Plastik & Metal Work Industries Sdn Bhd & Ors v. Daimler Chrysler Malaysia Sdn Bhd & Ors [2014] 8 CLJ 998 CA ***(refd)***
Mayban Trustees Bhd v. CIMB Bank Bhd & Other Appeals [2013] 2 CLJ 306 CA ***(refd)***
Mohammed Ali Shaher and Others v. British Aerospace Flying College Limited [2002] ScotCS 151 ***(refd)***
New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC ***(refd)***
Oberoi Imperial Hotel v. Tan Kiah Eng [1992] 1 SLR 380 ***(refd)***
Perrett v. Collins [1998] 2 Lloyd's LR 255 ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
Premier Hotel Sdn Bhd v. Tang Ling Seng [1995] 1 LNS 166 HC ***(refd)***
Price & Co v. The Union Lighterage [1904] 1 KB 412 ***(refd)***
RHB Bank Bhd v. Mogana Sunthari Subramaniam [2016] 4 CLJ 541 CA ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Scot v. London and St Katherine Docks (1865) 3 H & C 596 ***(refd)***
Sivalingam Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Smith v. Baker [1891-4] All ER Rep 69 ***(refd)***
Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale [1967] 1 AC 361 ***(refd)***

A *Teoh Guat Looi v. Ng Hong Guan [1998] 4 CLJ 416 CA* ***(refd)***
The Pacific Bank Bhd v. Kerajaan Negeri Sarawak [2015] 3 CLJ 717 FC ***(refd)***
Ting Jie Hoo v. Lian Soon Hing Shipping Co [1990] 1 CLJ 167; [1990] 3 CLJ (Rep) 267 HC ***(refd)***
United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***
B *Watson v. British Boxing Board of Control Ltd And Another [2001] QB 1134* ***(refd)***
Woon Yoke Lin (Berniaga sebagai Syarikat Ceritaku) v. United Estates Projects Berhad (1998) 4 AMR 4052 ***(refd)***
Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals [2015] 2 CLJ 766 CA ***(refd)***

C **Legislation referred to:**
Civil Aviation Regulations 1996, s. 9
Civil Law Act 1956, ss. 7(2), (3)(iv)(d), 8
Consumer Protection Act 1999, s. 24D(1)
Contracts Act 1950, s. 29
Evidence Act 1950, s. 114(g)

D **Other source(s) referred to:**
Clerk & Lindsell on Torts, 18th edn, paras 7-192-7-196
Clerk & Lindsell on Torts, 21st edn, Sweet & Maxwell, p 260
Kreindler and Rodriguez, *Aviation Accident Law*, vol. 1, 2003, Lexis Nexis, pp 3-22 to 3-22
E Norchaya Talib, *Law of Torts in Malaysia*, 3rd edn

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JUDGMENT

G **Vazeer Alam Mydin Meera J:**

[1] The plaintiff's claim and the facts giving rise to that claim are well set out in the written submissions of learned counsel for the plaintiff and I have substantially adopted and set them out below.

The Plaintiff's Claim

H **[2]** The plaintiff's claim against the defendants is an estate and dependency claim based on ss. 7 and 8 of the Civil Law Act 1956 arising from a cause of action in negligence. The plaintiff is the mother and administratix of the estate of Mohamed Ihsan bin Saiyed Abu Thahir ("deceased") who passed away in an air crash in Lembah Beringin, Perak on
I 29 October 2009.

[3] The deceased was a student pilot who was training at the second defendant flying club and specifically under the instructions of the first defendant, who was at the material time, an assistant flying instructor with the club. The second defendant will be referred to interchangeably as "the club" or "RSFC". A

[4] The deceased was 22 years old at the time of his death and was a Software Engineering student at Asia Pacific Institute of Technology (APIIT). He was also the manager of Syarikat Mariam, a mini market business set up by his late father. The deceased was single, and lived at his family home with his mother and younger sister (aged seven at the time of his death). B C

[5] On the day of the air crash, the deceased embarked on two return flights from Sungai Besi (aerodrome WMKF) to Ipoh (aerodrome WMKI). This is evidenced by way of two flight plans (Bundle C pp. 57-58) filled out by the deceased and authorised by the Department of Civil Aviation (DCA). The first return flight took off from Sungai Besi at 10am on 29 October 2009, whereas the second return flight took off from Sungai Besi at 2pm on 29 October 2009. D

[6] The first flight of the fateful day was a dual flight which the first defendant piloted-in-command with the deceased by his side. The second flight of the day was, however, a solo cross-country flight piloted-in-command by the deceased himself. E

[7] The plaintiff also contended from the outset, ie, in paras. 9(f) and 10(d) of the amended statement of claim, and throughout the course of proceedings that the second flight of the day was the deceased's first solo cross-country flight. The defendants never challenged this contention in their pleadings, but later took issue with this and sought to adduce evidence that the second flight of the fateful day was not the deceased's first solo cross-country flight. To this end, the plaintiff's solicitors took the necessary objections at trial on grounds that the defendants sought to depart from their pleadings by trying to establish that the deceased had allegedly gone on his first solo cross-country flight to Melaka with one Captain Sharol. I will discuss this issue in further detail later on. F G

[8] The air crash happened while the deceased was en route to Sempang Air Force Base, Sungai Besi. Along the way, the deceased encountered bad weather and requested for height changes and radar vectors *via* Flight Information Services (FIS). The full transcript of the deceased's communication with FIS is annexed to the Air Accident Investigation Report dated 8 July 2013 (exh. P1), which was done by the Chief Inspector of Air Accidents, Ministry of Transport Malaysia. At approximately 4pm on 29 October 2009, the aircraft crashed in or around Lembah Beringin, Perak, and killed the deceased on the spot. H I

[9] It is the plaintiff's case that the air crash, which took the life of the deceased, was caused by the negligence of the first and second defendants. The plaintiff relies on exh. P1, and states that it is the best possible evidence that supports the plaintiff's case. The report in P1 (para. 3.2 at p.19) expressly identified the probable cause of the crash as the lack of skill and knowledge of the deceased to fly in Instrument Meteorological Conditions (IMC). P1 also went on to recommend that RSFC instructors review and monitor weather information before a trainee pilot is allowed to take off on a flight.

[10] The antecedent facts are as follows. The deceased applied to be a member of the club on 11 December 2008, approximately ten months prior to his death. The deceased held a Student Pilot's License (SPL) and was licensed to fly SPL airplanes. The aim of the deceased in joining the club was to obtain his Private Pilot's License (PPL).

[11] The deceased's training at the club was to be in accordance with a syllabus approved by the DCA (exh. P2). According to SP2, Encik Idrus bin Abd Rahman, (who was, at the material time, the Deputy Director, Flight Operations Sector, DCA), the syllabus is a set of flight programs that a candidate for a PPL needs to complete prior to issuance of the PPL. There are, in total, 47 lessons to be completed before a student can qualify for a PPL flight test (which is lesson #48 in the syllabus). The lessons were conducted in four different phases. Upon completion of each lesson, the instructor pilot (here, the first defendant) is tasked to fill out the lesson plans which identify the aims of each lesson as well as the completion standards required of a student.

[12] The club itself was bound by an operations manual (exh. P3) which is approved by the DCA. Exhibit P3 sets out the minimum requirements of the DCA and the club is required to operate in accordance to it. It is expressly set out in the document (P3) itself that the aim of P3 is:

> … to provide detail information and instruction so as to enable the RSFC aircrew, operating staffs and students carry out their duties and training in a standard, safe and efficient manner.

P3 sets out, among other things, the daily maximum student training times and the requirement to obtain weather reports prior to a flight. These are crucial to the determination of the issues raised in this action.

[13] Finally, each pilot maintained a log book which logged the details of each flight that the pilot embarked on. The deceased's logbook was never adduced at trial although SD4, Encik Abdul Razak bin Hashim, the club President, testified that the club would maintain a copy of the student's log book.

[14] It is the plaintiff's case that the air crash that caused the deceased's death was due to the negligence of the first defendant as servant, agent and/or employee of the second defendant in the management and/or control of the aircraft and/or the management and conduct of the flying lessons of the deceased. The plaintiff has particularised negligence in para. 10 of the amended statement of claim. In para. 11 of the amended statement of claim, the plaintiff has pleaded reliance on the doctrine of *res ipsa loquitor*.

The Defence

[15] The defendants' defence is twofold:

(i) first, the defendants' deny negligence on their part and contend that the air crash, and consequently the death of the deceased, was the result of "human error"; and

(ii) second, the defendants allege that the deceased understood that flying was a risky activity and had agreed not to take any action whether by himself or by his administration or estate against the defendants for injury or death. In essence, the defendants have sought to rely on the defence of *volenti non fit injuria* - ie, that since the deceased willingly assumed the risk of flying, no harm can be alleged to be done against him.

The Third Party Claim

[16] The defendants were granted leave to issue third party proceedings against the third party, who is the owner of the aircraft in question, upon the defendants' allegation that the third party bears responsibility;

(a) to obtain insurance cover for the said aircraft, including for trainee pilots of the second defendant who use the aircraft for training purposes; and

(b) to keep the aircraft in good airworthy condition at all time.

[17] The defendants have pleaded that they will claim from the third party such sums as may be ordered by this court to be paid by the defendants as a consequence of the aircraft not being airworthy and/or for any loss suffered by the defendant as a consequence of the third party failing to obtain insurance cover in respect of the aircraft and its pilots at the material time.

[18] The third party filed its defence, wherein it has pleaded that there is insurance cover from American Home Assurance for loss or damage arising from flights handled by the third party. However, this insurance policy does not cover personal injury or death to trainee pilots during training sessions conducted by the second defendant. The third party avers that this as been conveyed to the second defendant and further avers that contractually the second defendant would have to take its own insurance policy to cover such events.

[19] The third party further states that the third party had filed an action against the second defendant at the Malacca High Court *vide* Suit No. 22-84-2011 claiming for loss suffered by the third party as a result of damage to the said aircraft. This civil suit was settled by the parties entering into a consent judgment dated 7 February 2013, wherein the second defendant agreed to pay the third party the sum of RM35,000 with interest as full and final settlement of the claim. Therefore, the third party avers that the second defendant is estopped from filing this third party claim against the third party.

Do The Defendants Owe A Duty Of Care To The Deceased?

[20] To establish a case in negligence the plaintiff would have to prove that:

(a) the defendants owed a duty of care to the deceased;

(b) the defendants breached that duty of care; and

(c) the plaintiff has suffered foreseeable damages flowing from that breach.

In *Caparo Industries Plc v. Dickman* [1990] 2 AC 605, Lord Bridge summarised the ingredients to determine the existence of a duty of care as follows:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of proximity or neighbourhood and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[21] The Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389 applied the test espoused by Lord Bridge in *Caparo*, where Steve Shim CJ (Sabah & Sarawak) broke it down to the elements of foreseeability, proximity and the additional requirement of justice, fairness and reasonableness ("the *Caparo* test"). This principle has now been consistently applied by Malaysian courts in establishing whether a duty of care exists. See *Arnica Corporation Sdn Bhd v. Robert Teo Keng Tuan & Anor & Other Appeals* [2015] 1 LNS 1220; [2016] 2 MLJ 119 CA.

[22] In applying the *Caparo* test, I find that the defendants owed a duty of care to the deceased to provide a safe flying environment for him, notwithstanding that the activity of flying is intrinsically dangerous. The defendants also owed a duty to ensure that the training given to the deceased was conducted according to the approved syllabus and/or the requirements of the DCA. It is reasonably foreseeable that if the deceased was authorised to fly solo in adverse weather conditions, he would come into contact with

clouds and in such condition, unless the deceased has been given the appropriate training, he would not have the requisite expertise to navigate away from the bad weather. Proximity is also easily established by virtue of the relationship of the first defendant as instructor and the second defendant as the flying club/training school on the one part and the deceased as student on the other part.

[23] Proximal relationship is also established by the fact that the deceased was also a member of the club. The operations manual (P3), rules and bye-laws of the club is a contract between the club and its members and the members *inter-se.* Therefore, this contractual nexus between the second defendant and the deceased would be further evidence of proximal relationship. In the premise, I am of the opinion that it is just and reasonable for a duty to be imposed on the defendants, as will be further borne out by the facts.

[24] The second defendant had made the following statement in the club's brochure to describe some of the 'advantages' of training with the club:

> (a) three modern aircrafts available for training purposes … You will find their measure of performance provides you with the extra safety factor which is so important;
>
> (b) Why not come out to the club ... and talk to … the pupils who are meticulously trained to the highest possible standards laid down by the Department of Civil Aviation - Malaysia.

SD4, Encik Abdul Razak bin Hashim, the club president, gave evidence that the club's brochure is used to attract students and that the club has had students since the year 1930. Thus, the second defendant has represented to its potential students, which would include the deceased, that they train students in accordance to the highest possible standards laid down by the DCA. This would include the provisions in the operations manual as well as the statutory rules and regulations governing the training of student pilots as laid down by the relevant authorities, including the DCA. Therefore, it would be incumbent upon the defendants to provide training that accords with such high standards.

[25] It has been well recognised that a flying school owes a high duty of care to student pilots. In this regard, the following passage in the American text book titled *Aviation Accident Law* by Kreindler and Rodriguez, vol. 1, 2003, Lexis Nexis, at pp. 3-22 to 3-22.1, is instructive:

> **A flying school owes a high duty of care to a student pilot**. For example, in *Linam v. Murphy*, the Supreme Court of Missouri indicated that a flying school's liability to a student pilot was more that of a carrier than that of a master. The court stated that although the defendants were not insurers of the plaintiff's safety, **they had assumed the duty of giving him an adequate course of pilot training by competent instructors** and with

A suitable equipment. **This included compliance with Civil Aeronautics Board rules and regulations**. The degree of care required of defendants was that described by the familiar common law principles of negligence. (emphasis added)

The above text further states that flying schools were held liable for allowing B a student pilot to fly with insufficient training. I am in agreement with the law as stated in the above text for it accords well with the common law principles of negligence that has become part of the Malaysian legal landscape; and I would without any hesitation apply the same to the present case. And further having applied the *Caparo* test I would hold that the first C defendant as the flight instructor and the second defendant as the flying school/club owed a duty of care to the deceased.

[26] In doing so I have also taken guidance from the case of *Perrett v. Collins* [1998] 2 Lloyd's LR 255, where the English Court of Appeal held that a duty of care was owed by the defendant flying association to the claimant D owner of the aircraft when the latter was injured. The claimant had installed a gearbox different to that supplied by the manufacturer but the flying association had certified the aircraft as fit to fly. Shortly thereafter, the aircraft crashed and the claimant was injured. At p. 262 of the judgment, LJ Hobhouse discussed the concept of 'duty of care' as follows:

E Where the plaintiff belongs to a class which either is or ought to be within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control over and responsibility for a situation which, if dangerous, will be liable to injure the plaintiff, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause the plaintiff F injury.

That pronouncement of law was adopted and applied by Prasad Abraham J (now JCA) in *Jordan Saw Yu Huan v. Low Suan Chuan & Ors* [2012] 1 LNS 1069; [2013] 4 MLJ 137, which involved a negligence claim for damages arising from injuries caused whilst undertaking the risky and dangerous G sports of motor racing.

[27] Further, in *Watson v. British Boxing Board of Control Ltd And Another* [2001] QB 1134, the English Court of Appeal in construing whether a duty of care existed between a professional boxer and the regulating body, held H that:

… since the board set out by its rules, directions and guidance to make comprehensive provision for the services to be provided to safeguard the health of professional boxers taking part in a sport the object of which was to inflict physical injury and since all involved in a boxing contest were obliged to accept and comply with the board's requirements, there was I sufficient proximity between the claimant and the board to give rise to a duty of care; that the board was a body with specialist knowledge giving

> advice to a defined class of persons in the knowledge that that class would rely upon that advice in boxing contests, and the claimant in fact relied on the board to exercise skill and care in ensuring his safety during a fight; that since the claimant belonged to a class of persons within the contemplation of the board, which was itself involved in an activity which gave it complete control over and a responsibility for a boxing contest which would be liable to result in injury to the claimant if reasonable care were not exercised by the board, it was fair, just and reasonable to impose a duty of care on the board…

The situation in the present case is not too dissimilar to these cases. The defendants, at all times, have control and management over the training of the deceased, a student pilot. The second defendant had by its representations in the club's brochure and the stipulations in the operations manual (P3) covenanted to provide training to the deceased in accordance to the requirements of the law and its very own high safety standards. Thus, there exists a close proximal relationship wherein the defendants would be liable in the event of injury or death to their students if reasonable care were not exercised to ensure that the standards that are expected of the defendants are not kept and/or are breached. Thus, it is reasonably foreseeable that the defendants owed a duty of care to all their students, including the deceased, while undergoing flight training at the club.

Did The Defendants Breach The Duty Of Care?

[28] Learned counsel for the plaintiff submits that the defendants had breached their duty of care to the deceased. In this regard, learned counsel has placed considerable reliance in exh. P1, the independent investigation report by the Ministry of Transport, and based on the findings therein, submits that:

(a) the weather condition on the day of the air crash was not suitable for the deceased to continue with a Visual Flight Rules (VFR) flight, ie, to fly without the aid of instruments;

(b) inexperience and logistical implications could have been factors in the deceased's decision to proceed with his planned destination despite the unfavourable weather conditions;

(c) fatigue could have had an effect on the deceased's judgment and decision making as the ill-fated flight was the deceased's second flight for the day; and

(d) the deceased was not trained to fly using instruments, ie, Instrument Meteorological Conditions (IMC).

[29] The defendants however dispute that contention and blame the deceased for entering adverse weather condition. It is the defendants' case that, although the weather was unfavourable, the deceased did not do what

he ought to have done, which was to turn back to Ipoh or alternatively to change the flight path and fly along the coast line. Further, SD4 also suggested in evidence that the deceased "created his own problem" by deliberately flying into the clouds and that he ought to have changed course to ensure his own safety. Learned counsel for the plaintiff submits that this suggestion is wholly unreasonable as such a course of action would have entailed the deceased having to go against the instructions of the flight control tower and deviate from the planned route (based on the approved flight plan).

[30] Over and above the evidence in P1, it is also the plaintiff's case that the first defendant was not authorised to approve the deceased's solo cross-country flight on 29 October 2009. The defendants dispute this and allege that:

(a) the first defendant was authorised to clear the deceased for his solo cross-country flight on 29 October 2009 to Ipoh and back; and

(b) in any event, the solo flight on 29 October 2009 to Ipoh and back was not the deceased's first solo cross-country flight.

[31] It is common ground that, student pilots, including the deceased, are only trained to fly in Visual Flight Rules (VFR) in Visual Meteorological Conditions (VMC). SD2, Mr Ramesh explained VMC conditions as follows:

> VMC is a condition called, Visual Meteorological Condition. In most instances, you are to be, it depends on the height, if you are like 3,000 feet and below, you are supposed to maintain a visibility of five kilometers, for visibility and you are supposed to stay away 1,000 feet separation from the, particular separation from the cloud and the 1,500 metres away from clouds.

It is also common ground that the deceased was not trained to fly in Instrument Meteorological Conditions (IMC). SD2 explained IMC conditions as:

> IMC conditions means the conditions for you to maintain your orientation, your awareness of where you are and what's happening later would have to be done solely on instruments because there are no outside references. You lose sight of the ground and you lose sight of the horizon and the only way to know what's happening to the aircraft is by looking inside and referring to the instruments.

[32] It is an undisputed fact that at the time of the air crash, weather conditions were unfavourable for flying in Visual Flight Rules (VFR) conditions. In fact, the deceased had himself reported that the weather was 'very bad' while he was on the flight. The very bad weather was supported by the meteorological forecast for the relevant aerodromes along the flight path. Between 3pm and 6pm on 29 October 2009, visibility was expected to reduce to 5000 meters with thunderstorm and rain showers. The first

defendant confirmed during cross-examination that he had the meteorological forecast in hand before he cleared the deceased to fly solo cross-country to Ipoh and back to Sungai Besi aerodrome.

[33] Learned counsel for the plaintiff submits that since the deceased was only trained to fly in VFR conditions, the weather forecast for the day of the air crash ought to have been a paramount consideration in determining whether any pilot (particularly the deceased, as a student) could be cleared for a flight. Learned counsel further submits that if the weather conditions were unfavourable, whether forecasted or actual, it would have been prudent for the first defendant and by extension thereof, the club to disallow the deceased from embarking on his solo flight. I agree entirely with that contention, for its only logical that if low clouds and unfavourable weather, actual or forecasted before take off, would hamper visibility to below the required distance as explained by SD2, a VFR rated student pilot, such as the deceased, ought not to be cleared to fly in such condition.

[34] In fact, it is pertinent to note that it was not within the discretion of the first defendant to determine whether the deceased could manage a solo cross-country flight in unfavourable weather conditions. The operations manual (P3) specifically provides for minimum weather conditions to be met before a student training flight takes off. I find that it was precisely for this reason that the concluding remarks in the report in P1 under the heading "safety recommendations" had recommended that:

> The RSFC instructors should review and monitor the weather information (current and forecast) in relation to the flight plan before a solo SPL pilot is allowed to take off.

[35] Learned counsel for the plaintiff further submits that, contrary to the first defendant's assertion, it is more probable than not that the first defendant had failed to obtain a copy of the weather forecast before clearing the deceased for his first solo cross-country flight on 29 October 2009. Counsel points out that all the weather forecast reports submitted in evidence are dated 2 November 2009, ie, more than a month after the accident happened. The defendants did not adduce any contemporaneous documentary evidence to show that the first defendant did indeed have a copy of the weather forecast for the day before he cleared the deceased for his solo flight on 29 October 2009. This, counsel contends, is by itself an act of negligence on the part of the first defendant as instructor, and by extension the second defendant as the flight school.

[36] Further, learned counsel for the plaintiff contends that, even if the first defendant had copies of the weather reports before he cleared the deceased to take off on the fateful flight, the first defendant was grossly negligent in allowing the deceased to fly in such unfavourable forecasted weather conditions.

[37] I find that from the totality of evidence, and the respective positions of the plaintiff and the defendants on this issue, it can be surmised that one of two probable scenarios could have transpired on that fateful day:

(a) either the first defendant failed, refused or neglected to obtain the weather forecast (although the operation manual (P3) specifically requires that a pilot obtain a weather report prior to flight); or

(b) even if the first defendant did obtain the weather forecast, it was grossly negligent of him to allow the deceased to fly solo when the minimum weather requirements for a VFR flight were not met.

[38] Whichever the scenario, I find that on both counts it would be gross negligence on the part of the defendants. Having analysed the evidence, the evidential tilt shows that it is more probable than not that the first defendant did not have the weather reports for the day before he cleared the deceased to fly solo and that itself would be breach of the defendants' duty of care owed to the deceased. If indeed the first defendant and the club had obtained the weather forecast for the day prior to clearing the deceased's flight, then surely they must have it in their records. However, none were produced bearing a contemporaneous date. The weather reports tendered in court were printed out subsequent to the fateful date, for they bear a much later date. The non-production of a contemporaneously dated weather report speaks volumes about the defendants' version of events.

[39] Now, even if the first defendant had obtained the weather report for the day, I find that his act of clearing the deceased to fly solo was in breach of his duty of care to the deceased. The operations manual (P3) specifically provides for minimum weather conditions to be met before student-training flights can take off. It is the duty of the defendants to ensure that the stipulations in the operations manual (P3) are strictly adhered to. However, this does not seem have been done. In fact during cross-examination, the first defendant agreed that:

(a) the deceased's flight was below 3,000 feet;

(b) the weather was not clear of cloud and terrain within that altitude; and

(c) flight visibility was only at 4km even though the minimum requirement for a VFR flight was 5km.

[40] Clearly such a flight did not meet the minimum weather requirement for a VFR flight piloted by the deceased. In the circumstance, I agree with the submissions of learned counsel for the plaintiff that it was not within the discretion of the first defendant nor the club to determine whether the deceased could manage a solo flight in such unfavourable weather conditions. The defendants ought to have had due regard to stipulations in their very own operations manual (P3) and followed the same. And in such circumstances,

the first defendant ought not to have cleared the deceased to fly solo. I find that it was wholly wrong for the first defendant to authorise the deceased to undergo the solo flight on 29 October 2009 in such adverse weather conditions.

[41] In this regard, I have adverted to and adopted the reasoning advanced in *Mohammed Ali Shaher and Others v. British Aerospace Flying College Limited* [2002] ScotCS 151 (28 May 2002), by the Sessions Court of Scotland where it found an instructor of a flying club liable in negligence over the death of a trainee pilot whom he had allowed on a solo flight in unfavourable (cloudy) weather conditions. The court held as follows:

> 19. I am satisfied that Captain McDougall was wholly wrong in authorising Tareq Shaher to undergo this particular flight in the circumstances on the day in question ... **I am of the opinion that in instructing and authorising this particular flight, he was entirely in error** ... As he himself freely accepted, *Captain McDougall was aware that there would be significant areas of broken cloud in the second part of the route. It was therefore foreseeable, and should have been foreseen by Captain McDougall, that Tareq Shaher would not only attempt to complete his route, but that this would bring him into contact with significant areas of broken cloud. It is common ground that he was not trained to fly in cloud* ... He should therefore have anticipated that Tareq Shaher would not only be liable to fly towards the broken cloud, but that his defective airmanship might cause him to fly into that cloud ... *It was clear that once Tareq Shaher entered cloud in these circumstances, he was liable to lose control of his aeroplane and crash. While he had been advised that if he did by chance enter cloud, he should do a 180° turn, I accepted the expert evidence for the pursuers that once an inexperienced pilot like Tareq Shaher enters cloud, he is likely not to survive*. (emphasis added)

The observation and findings of the learned judge in that case is very much applicable to the present case as the factual scenario in the Scottish case is very similar to ours. The first defendant instructed and authorised the deceased's solo flight when he was aware (if he had the weather report) of the probable adverse weather conditions. In such circumstance, it would clearly be in breach of his duty of care to the deceased to ensure that the deceased did not take off and fly in unfavourable weather condition that was unsuitable for a VFR flight.

[42] The defendants contend that weather is unpredictable and conditions may change abruptly, and that such occurrences are not uncommon in Malaysia. The defendants state that it is precisely for this reason that VFR rated student pilots are instructed to turn back, ie, make a 180° turn when meeting sudden inclement weather or when flying into thick clouds that hamper visibility. I am unable to accept this contention. Here, it is not a case of a sudden change in weather. The weather report clearly indicated forecast of inclement weather with low clouds within the range of the flight's altitude

along the flight path. Clearly such weather conditions would not be conducive for a VFR flight. The first defendant, if he had the weather report, would have known of such adverse weather condition and should not have cleared the flight in the first place.

[43] While even if the deceased had been instructed and advised to do a 180° turn if he entered clouds, or to change course towards the coast and fly along the coast when visibility is hampered, I find that such manoeuvres would not have been possible as the deceased did not have the necessary skill and was inexperienced to take these manoeuvres in such adverse weather conditions. When entering clouds in such adverse weather, the deceased would be spatially disoriented, and it is highly likely that the deceased would not survive a crash that may ensue from such conditions. The first defendant, as instructor who had management and control of the deceased's training, should have anticipated this possibility and should not have authorised the solo flight in such adverse weather conditions.

[44] Having put the deceased in this wholly avoidable situation, it is not open to the defendants to now argue that the deceased ought to have turned back or changed the flight path and fly along the coastline. The last recorded communication between the deceased and the control tower clearly shows that the deceased was spatially disoriented such that he was not in a position to contemplate a change of course towards the coastline, or to make a 180° turn. As a student pilot, the deceased was only trained to fly in VFR conditions. His inexperience in flying in IMC conditions proved to be a major impediment as he was not able to navigate away from bad weather using instruments. Once he was in such thick clouds, the deceased, being not trained to fly with instruments, ie, in IMC, was doomed to encounter a situation that could lead to fatal consequence, as was the case here.

[45] In addition to the above, there is another serious breach of the operations manual (P3) by the first defendant, and by extension the second defendant. Each return flight to Ipoh from Sungai Besi was scheduled to take two hours. The record shows that on the fateful day the deceased had flown with the first defendant in the morning at 10am to Ipoh and back; and thereafter he embarked on a solo return flight to Ipoh at 2pm. Therefore, in total, the deceased trained for more than two hours on that day. This is a clear breach of para. 5.6.2 of the operations manual (P3), which expressly states that the maximum student training time is two hours per day. There is an important reason to restrict the daily student flight training duration to two hours, and that is to avoid fatigue setting in. Thus, when the first defendant cleared the deceased to fly solo on that fateful day, which was the deceased's second flight for the day to and from Ipoh, it was a clear breach of this provision. In fact, fatigue had probably set in with the deceased and this was the reason that the DCA investigation team had, in P1, stated that

fatigue could have had an effect on the deceased's judgment and decision-making capabilities. This would be another breach of the duty of care by the first defendant.

[46] The other issue that needs consideration is the question of whether the fateful flight was the deceased's first solo cross-country flight? For if it was, as contended by the plaintiff, then it would be another breach of the operations manual (P3). The defendants however state that the fateful flight was the deceased's second solo cross-country flight. Let me consider this contrary position of the parties.

[47] The argument of the plaintiff goes as follows. A student pilot's training is done in accordance to the training syllabus (P2) and trainee pilots must go through all the lessons in the syllabus progressively before they are able to qualify for a PPL. The training syllabus (P2) also requires the student to have undergone all earlier lessons before embarking on a solo flight. It goes without saying that the lesson plan contained in the syllabus must be strictly followed.

[48] The completed lesson plans are important not merely because they are the best possible evidence to show that a student has completed a particular lesson in his syllabus. More so, however, the lesson plans also stipulate the aim to be achieved for each lesson and the standards, which a student is required to meet after the completion of each lesson. For instance, lessons #25 and 26 would have trained the deceased in handling emergencies, such as the state the deceased was in prior to the crash. Lesson #30 would have trained the deceased to familiarise himself with a 'diversion' - which SD4 said the deceased ought to have done to avoid bad weather.

[49] The plaintiff's case is that the first defendant had failed to ensure that the deceased had undergone all the requisite lessons before he embarked on the solo flight and that this failure amounts to gross negligence. Learned counsel for the plaintiff submits that the contemporaneous documentary evidence supports the plaintiff's position as there is no evidence that the following lessons were undertaken by the deceased, namely, lessons #1, 21, 24, 25, 26, 29, 30, 31, 32, 33 and 34. The final lesson plan submitted for the deceased was lesson #35. If indeed the defendants had followed the black-letter of the syllabus and ensured that the deceased completed all his lessons, the two flights in the morning and afternoon of 29 October 2009 would have been lessons #40 and #41 respectively. These flights were however not documented.

[50] I will have to agree with that contention because as far as the training syllabus (P2) is concerned, the records maintained by the defendants and tendered in evidence, suggests that the deceased had not undergone training for all the lessons. There are obvious gaps in the documents. Now, before the deceased is cleared to fly his first cross-country solo flight, he would have

had to complete the previous lessons. Similarly for his second cross-country solo flight he must complete the preceding lessons. The defendants have a duty to ensure that all such prior lessons are completed before the deceased is allowed to embark on his solo cross-country flights. These lessons, once completed, would have to be documented by the deceased and the defendants by completing out the respective lesson sheets in the syllabus. A copy of such completed lesson sheets would have to be kept and maintained by the defendants. However, the defendants did not produce these completed lesson sheets evidencing the deceased having completed the lessons as evidence in court.

[51] Learned counsel for the defendants submits that both the first defendant and SD4, En Abdul Razak bin Hashim, the President of the club, who was an experienced pilot himself, testified that the training is such that a trainee pilot will have to go through the training in sequence according to the syllabus, and that without going through an exercise, it will not be possible to go to the next. Learned counsel for the defendants submits that this evidence was not challenged and as such it must mean that the plaintiff accepts that the deceased went through the exercises in sequence. Counsel relies on the cases of *Sivalingam Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395, CA; and *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & Ors And Another Case* [1995] CLJ 639; [1995] 2 MLJ 770 in support of this contention. Further counsel submits that the independent inquiry report (P1) did not find that the deceased was not given training according to the syllabus, nor did it find that the first defendant did not comply with the training requirements. Additionally counsel argues that SP2, Idrus bin Abd Rahman, the Chief Inspector of Air Accident, had agreed during cross-examination that the deceased was sufficiently trained before he was allowed to go on the solo flight. Similarly, SP3, Zainal Abidin Aidin bin Omar, a DCA officer who was the co-investigator and a signatory to P1, agreed in cross-examination that he did not find evidence or anything to suggest that the deceased was not ready to fly solo. Thus, counsel contends that the evidence of both the first defendant, SP2 and SP3 puts paid to the plaintiff's contention that the deceased was not sufficiently trained before embarking on that fateful solo flight.

[52] Now, I am unable to accept this contention for the following reasons. Firstly, the evidence of SP2 and SP3 as to whether the deceased's training was done sequentially in accordance to the syllabus is merely an opinion and not evidence based on direct knowledge. In order to come such an opinion, SP2 would have had to rely on documents supplied by the defendants and the oral interviews of the first defendant and other employees of the club. If indeed there was documentary evidence of this and these were supplied to the DCA investigators, then it ought to have been produced in court, but none were produced. In fact, there is no evidence that such documents were

ever supplied to the DCA investigators. Therefore, in the absence of any supporting documentary evidence, I cannot give any weight to this opinion evidence of SP2 and SP3. Secondly, I find that the issue of the relating to the sequential training of the deceased and its attended documents was raised when SP3 was testifying. And SD1 and SD4 were specifically challenged on this issue and the plaintiff's case was well put by counsel for the plaintiff to these witnesses of the defendants. Thus, based on the available evidence before the court, I find that it is more probable than not, that the deceased did not complete the various lessons sequentially before embarking on his solo cross-country flight to Ipoh.

[53] Despite the lack of supporting contemporaneous documentary evidence, the first defendant testified orally that the deceased had indeed undergone all the required lessons prior to his solo cross-country flights, including the fateful flight. The first defendant maintained that the deceased's solo cross-country flight to Ipoh on 29 October 2009 was his second solo cross-country flight, which was opposed to the plaintiff's case that this flight was the deceased's first solo cross-country flight. The defendants state that the deceased's first solo cross-country flight was to Melaka on 13 August 2009.

[54] The issue of whether the deceased's solo flight to Ipoh on the fateful day was his first or second solo cross-country flight is crucial to the determination of whether there was breach of stipulations in the relevant DCA rules and/or the operations manual. If the flight to Ipoh was the first solo cross-country flight, then the first defendant being an Assistant Flight Instructor (AFI) with the club did not have the authority to clear the flight, he would only have such authority if it was the deceased's second or subsequent solo cross-country flight. The first solo cross-country flight can only be authorised by a Chief Flying Instructor (CFI) and/or a Qualified Flying Instructor (QFI).

[55] In support of their contention that the solo flight to Melaka on 13 August 2009 was the deceased's first solo cross-country flight, the defendants on the second day of trial, ie, on 17 March 2015, sought to tender two additional documents to court, namely; the flight listing from 1 January 2009 to 30 October 2009 (marked IDD4) and a technical log (marked IDD5). However, learned counsel for the plaintiff objected to the admissibility of these two documents on grounds that:

(i) the purported flight to Melaka did not form part of the defendants' pleadings although the plaintiff had specifically pleaded in its particulars of negligence that the defendants had failed to ensure that the deceased's first solo cross-country flight to Ipoh was authorised by a chief flying instructor (CFI) and/or a qualified flying instructor (QFI); and

(ii) although the plaintiff had, during pre-trial discovery, requested for copies of all pertinent documents relating to the deceased which were kept by the club, the defendants never gave the plaintiff a copy of IDD5 prior to 17 March 2015

[56] Learned counsel for the plaintiff submitted that IDD5 is an extract of a technical log, which is the property of the third party in this action. SD2, Ramesh, a subpoena witness who was the resident flight instructor (RFI) at the club at the material time testified that:

(a) the technical log is maintained by the club;

(b) the technical log is proof of the flight;

(c) the technical log is available in the club; and

(d) if there was a flight on 13 August 2009, the pilot on that flight would have had to file a flight plan and a copy of the flight plan would be kept in the club and with the Air Force (the Sungai Besi or Sempang Aerodrome was under the control of the Royal Malaysia Air Force).

[57] In this regard, it is noteworthy that despite the plaintiff's counsel's insistence on sighting the technical log maintained by the club, the club failed to produce the same. The club also failed to produce the flight plan for the purported flight by the deceased on 13 August 2009 to Melaka. Both these documents would be in the possession of the club, as confirmed by SD2. No reasons were given as to the defendants' inability to produce these documents. In the circumstance, I agreed with submissions of counsel for the plaintiff and disallowed IDD4 and IDD5 to be admitted in evidence. It is trite law that all evidence based on identification documents, in this case IDD4 and IDD5, would have to be disregarded. In *Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33; [1998] 6 MLJ 1 the court at p. 46 (CLJ); p. 14 (MLJ) had remarked:

> It is settled law that where a document is sought to be proved in order to establish the truth of the facts contained in it, the maker has to be called (see *R v. Gillespie* [1967] 51 Cr App Rep 172; *R v. Plumer* [1814] R & R 264: *Hill v. Baxter* [1958] 1 QB 277; *R v. Moghal* [1977] Crim LR 373). Non-compliance with this rule will result in the contents of the documents being hearsay. The evidential effect of a document which has not been properly proved was described by Abdoolcader J (as he then was) in *PP v. Datuk Haji Harun Haji Idris & Ors* [1977] 1 LNS 24; [1977] 1 MLJ 180 at p. 183 in the following terms:
>
> > It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in

> for identification only and which are the audited accounts and annual report of the Bank for the years 1973-1974 and 1972 respectively. *As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto* ... (emphasis added)

This principle was reiterated by the Federal Court in the recent case of *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579. Therefore, in keeping with these binding authorities, I had disregarded not only the contents of IDD4 and IDD5 but also all oral testimony based on these documents.

[58] Further, it is the position of the club that the alleged first solo cross-country flight to Melaka was authorised by a Captain Sharol (sometimes referred to as Major Shahrul Mohamed or Major Sharol). According to SD3, Captain Sharol is an employee of the club and is a DCA authorised examiner at the club. If indeed such a solo cross-country flight to Melaka was undertaken by the deceased, Captain Sharol was the only other person (apart from the deceased) who would have been able to confirm under oath whether or not the deceased embarked on a solo flight to Melaka on 13 August 2009, as alleged. However, Captain Sharol was not called as a witness and the defendants failed to explain the reason why Captain Sharol was not called to testify. In this regard, learned counsel for the plaintiff submits that adverse inference under s. 114(g) of the Evidence Act 1950 ought to be drawn against the defendants for their failure to call Captain Sharol as a witness.

[59] I agree that Captain Sharol is a material witness who would have been able to confirm whether in fact there was a solo cross-country flight piloted by the deceased on 13 August 2009 to Melaka and back. Captain Sharol's testimony is particularly important when considering that there are no contemporaneous documents to support the defendants' contention that the deceased had in fact embarked on his first solo cross-country flight on 13 August 2009 from Sungai Besi to Melaka and back. In *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd* [2006] 2 CLJ 409, Gopal Sri Ram JCA (as he then was) (at para 103, p. 463) remarked:

> Here is a man who is repeatedly mentioned by more than one witness relating the part he played. The respondent's failure to call him... warrants the drawing of an adverse inference under s. 114(g) of the Evidence Act 1950. It has been held by the Judicial Committee of the Privy Council in *Seth Maqanmal v. Darbarilal* AIR [1928] PC 39 that an adverse inference may be legitimately drawn against a party who fails:
>
> > To call as his witness the principal person involved in the transaction, who was in a position to give a firsthand account of the matters in controversy and throw light on them, and who could have refuted on oath the allegations of the other side ...

A This principle was reiterated by the Court of Appeal in the more recent case of *RHB Bank Bhd v. Mogana Sunthari Subramaniam* [2016] 4 CLJ 541, where in respect of the non-calling of a crucial witness, the court found as follows:

> It is evident from the foregoing that Junaidah's evidence is crucial to account for both the issuance of the cheques (for example the use of the
B second rubber stamp) as well as the monies encashed from these accounts.
>
> However, for no explicable reason the plaintiff, on whom the burden of proof lies, failed to call Junaidah. This stark failure suggests that the failure or refusal to call Junaidah as a witness amounted to a withholding
C of evidence. The presumption under s. 114(g) of the Evidence Act 1950 ought to have been invoked, namely that if Junaidah had been called by the plaintiff, her evidence would have been unfavourable to the plaintiff.

Thus, in the circumstances of the present case, the defendants' failure to call Captain Sharol, a material and crucial witness to proof the fact of the
D deceased's alleged first solo flight to Melaka, would be ample grounds for the court to invoke the adverse inference presumption under s. 114(g) of the Evidence Act 1950, to the effect that if he had been called to testify his testimony would be adverse to the defendants' case.

[60] Additionally, when IDD4 and IDD5, and the oral testimony based
E on these documents are discounted; I find that there is insufficient evidence to show that the purported solo flight to Melaka on 13 August 2009 took place. Further, it is pertinent to note the findings in the accident report (P1) at para. 1.1 where it states that the "Aircraft took off from WMKF for first solo navigation flight training." on the fateful day. As such, I find that
F on a preponderance of evidence the deceased's fateful flight to Ipoh on 29 October 2009 was his first solo cross-country flight.

[61] Now, that being so, the first defendant, being an AFI, would have breached the statutory provisions of s. 9(b) which falls under part B of the Eight Schedule (Regulation 41), Civil Aviation Regulations 1996, when the
G first defendant as an Assistant Flight Instructor (AFI) with the club cleared and authorised the deceased to fly solo on his maiden cross-country flight to Ipoh and back. Section 9(b) which falls under part B of the Eight Schedule (Regulation 41), Civil Aviation Regulations 1996 provides that:

> (9) Assistant Flying Instructor's Rating shall entitle the holder of the
H license to give instruction in flying aircrafts of such types as may be specified in the rating for that purpose:
>
> Provided that:
>
> (a) …
>
I (b) An assistant flying instructor's rating shall not entitle the holder of the license to give directions to the person undergoing instruction in respect of the performance by that person of:

(i) his first solo flight;

(ii) his first solo flight by night;

(iii) his first solo cross-country flight otherwise than by night;

(iv) his first solo cross-country flight by night.

Further the Club's Operations Manual (P3) provides at para. 5.8(a) that:

> No student pilot shall be permitted to fly solo in the club aircraft until the Flying Instructor cleared and authorised the student for solo.

Thus, while the Civil Aviation Regulations only disentitled an AFI from authorising a student's first solo cross-country flight, the club's regulations go beyond that to state that only a flying instructor may permit a student to fly solo (on any solo flight, not just on his first solo flight). Therefore, it is clear that the requirements of the club *vide* its operations manual, are even more stringent than the civil aviation regulations itself. At the material time, the first defendant, who was in charge of training the deceased, was only an Assistant Flight Instructor (AFI) with the club, and not a flying instructor. The organisation chart of the club (exh. P3 p. 38) specifically distinguishes an AFI from a Flight Instructor (FI), Resident Flight Instructor (RFI) and Certified Flight Instructor (CFI). Clearly, the first defendant was not a FI. Therefore, even if the fateful flight was the deceased's second solo cross-country flight, the first defendant would still be negligent in failing to comply with the stipulations in the operations manual (P3) as he was merely an AFI who could not clear and/or authorise the deceased to take off on a solo cross-country flight.

The Application Of The Doctrine Of *Res Ipsa Loquitor*

[62] Over and above the above instances of breaches of the duty of care, given the circumstances of the deceased's death by way of an air crash, the plaintiff also raised the plea of *res ipsa* loquitor and averred that the facts of the air crash speak for themselves as being an occurrence, which cannot normally happen without negligence by the first and/or second defendants.

[63] The well established doctrine of *res ipsa loquitor* has been explained in *Clerk & Lindsell on Torts*, (18th edn), paras 7-192-7-196 in the following terms:

> A further circumstance in which the court may infer carelessness on the part of the defendant is where the claimant can show that the nature of the accident suggests both negligence and the defendant's responsibility. Drawing the inference in such a circumstance is often described as an application of the doctrine of *res ipsa loquitur*. However, it is important to note that this label represents a rule of evidence and states no principle of law. As Morris LJ said 'This convenient and succinct formula possesses no magic qualities: nor has it any added virtue, other than that of brevity,

merely because it is expressed in Latin'. It is only a convenient label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. The doctrine which stems from the judgment of Erle CJ in *Scot v. London and St Katherine Docks*, applies where:

(1) the occurrence is such that it would not have happened without negligence;

(2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; and

(3) there is no evidence as to why or how the occurrence took-place; if there is such evidence, then appeal to *res ipsa loquitur* is inappropriate for the question of the defendant's negligence must be determined on such evidence.

The Court of Appeal in *Matang Plastik & Metal Work Industries Sdn Bhd & Ors v. Daimler Chrysler Malaysia Sdn Bhd & Ors* [2014] 8 CLJ 998; [2014] 6 MLJ 244, referred with approval to the above passage and the judgment of Erie CJ in *Scot v. London and St Katherine Docks* (1865) 3 H & C 596 in deciding whether the doctrine applied in that case. A plethora of cases show that Malaysian courts have not shied away from applying the maxim of *res ipsa loquitor* where the circumstances warrant its application. The Court of Appeal in *Teoh Guat Looi v. Ng Hong Guan* [1998] 4 CLJ 416; [1998] 4 MLJ 525 saw it fit to apply the maxim in a situation where the deceased died in a car crash. The court went on to explain the mechanics of the maxim as follows; ie, that once a *prima facie* case of negligence has been established, the onus of proof then shifts to the defendant to explain and show how the accident could have happened without negligence on his part.

[64] Learned counsel for the defendants submits that the doctrine of *res ipsa loquitor* does not apply to the facts of this case. Learned counsel for the defendants submits that the three requirements or elements necessary for the doctrine of *res ipsa loquitor* to apply are not satisfied, as:

(a) it cannot be said that the occurrence is such that it would not have happened without negligence as aircraft crash is also known to occur due to human error, including that of pilot;

(b) it cannot be said that the thing that inflicted the damage was under the sole management and control of the defendants, or of someone for whom they are responsible or whom he has a right to control, as it was the third party who carried out scheduled maintenance of the aircraft; and

(c) it cannot be said that there is no evidence as to the cause of the air crash as an air accident investigation was carried out by the Ministry of Transport and in its report (P1) at p. 19 states:

> 3.2 Cause
>
> The probable cause of the accident was that the pilot had encountered spatial disorientation (the inability to correctly perceive their position and orientation with respect to ground) while flying in IMC conditions without the appropriate skill and knowledge to fly in such conditions.

[65] However, learned counsel for the plaintiff takes a contrary position. In arguing that the doctrine of *res ipsa loquitor* applied in the instant case, learned counsel for the plaintiff has referred the court to the Privy Council case of *George v. Eagle Air Services Ltd And Others* [2009] 1 WLR 2133 where the employee of a defendant aircraft operator was killed in an air crash. The plaintiff/administratix raised the plea of *res ipsa loquitor*. The Privy Council in advising that the plaintiff's appeal be allowed held that the maxim is potentially of great importance in such cases owing to the difficulty of discharging the burden of proof in aviation cases. At para. 13, the board held:

> This was the defendants' aircraft, their flight and their pilot. **Aircraft, even small aircraft, do not usually crash, and certainly should not do so**. And, if they do, then, especially where the crash is on land as is here, it is *not unreasonable to suppose that their owner/operators will inform themselves of any unusual causes and not unreasonable to place on them the burden of producing an explanation which is at least consistent with absence of fault on their part*. The defendants have in fact never suggested or attempted to suggest any explanation of the accident or any reason preventing them giving an explanation. In the board's opinion, they have in the result failed to displace the inference of negligence which in the circumstances results from the crash itself. (emphasis added)

[66] The facts of the present case are not dissimilar to that in *George v. Eagle Air Services Ltd And Others (supra)*, in that the deceased was killed in an air crash while undergoing training at the club and under the instructions of the first defendant. No cogent explanation or reason for the air crash has been proffered by the defendants to justify absence of fault on their part, apart from a feeble plea of "human error". On the contrary, there is overwhelming contemporaneous evidence to support the finding of negligence on the defendants part - particularly the evidence of an independent investigation report in the form of P1, as well as the clear breach of the Civil Aviation Regulations and non-conformity with the club's own manual (P3).

[67] It is worth noting that despite the extensive particulars of negligence pleaded, the defendants' in their defence offered a bare denial and relied primarily on the defence of "human error" and the exclusion clause and/or on *volenti* as a defence. In considering the totality of evidence I find that the

doctrine of *res ipsa loquitor* would be applicable here. The plaintiff has clearly established the fact that the deceased found himself in a state of spatial disorientation because of adverse weather conditions with thick clouds, that condition led to the air crash and his eventual death. The plaintiff has also established that the defendants had control and management of the deceased's flight training and the flight was cleared for take-off upon their authorisation. The plaintiff has also tendered evidence showing that the said authorisation by the first defendant is wanting in law. Now, in the circumstance, the facts speak for themselves and show that the air crash would not have happen if not for the negligence of the defendants. In such circumstance, I find that doctrine of *res ipsa loquitor* is applicable and the defendants would then have to negate negligence on their part.

[68] I further find that the defendants have failed to discharge their onus of proving that the death of the deceased was not caused by negligence on their part. By arguing "human error" the defendants attribute blame unto the deceased for flying into clouds and not making a 180° turn or to divert from the flight path towards the coast and fly following the coastline. I find that such suggestions are not only inappropriate in the circumstances of overwhelming evidence of negligence, but it is highly insensitive and callous. In fact, SP3, Zainal Abidin bin Omar, the DCA Officer, testified that it would not have been legal for the deceased to change course as suggested by the defendants. Further SP3 said that the deceased was flying on radar, which means that his flight is controlled by radar and he would have to fly following instructions from radar control (FIS) and if the controller tells him to go into cloud, he would have to fly into cloud.

[69] It is impossible to establish what went through the mind of the deceased as he was on his solo flight on 29 October 2009 and when he hit into clouds. However, a good indication or reference would be the transcript of the deceased's recording with FIS. The deceased pleaded for help. He was afraid and did not know what to do. The instructions given by FIS was to navigate away from the 'very very bad clouds' but this would have required special skill to fly IMC, which the deceased did not have. Tragically, from the totality of evidence, that seems to be the probable course of events which led to the deceased encountering spatial disorientation and ultimately crashing to his death. Thus, given the facts, the only logical conclusion to be drawn is that the deceased should not have been on that fateful solo flight. Undoubtedly, it was through the sheer negligence of the defendants that the deceased embarked on that flight, and regretfully fatal consequences ensued.

The Exclusion Clause And Defence Of *Volenti*

[70] Now I shall move on to consider the *volenti not fit injuria* defence as well as the contractual exclusion of liability clause. In para. 10 of the defence, the defendants have pleaded that the deceased had appreciated the risk of flying; and had agreed not to take any action whether by himself or

by the administrator of his estate against the defendants for any injury or death. The defendants further aver that this agreement was made in accordance to the bye-laws of the second defendant and also when the deceased made his application to become a member of the second defendant.

[71] The deceased had filled out the second defendants standard application form to become a member of the club (pp. 6-7 of bundle B). At p. 6, just above the deceased's signature the following appear:

> In the event and in consideration of my election to the said Club I agree to become a member of the said Club and rally to keep and abide by the Memorandum and Articles of the said Club and keep its rules and bye-laws at all times and should my death or any injury to me occur close to or upon the aircraft, hangars or other premises of the Club, or as a result of flying or otherwise I for myself my executors and administrators hereby undertake not to bring any legal proceedings or to make any claim or demand for or in respect of such death or injury as aforesaid against the said Club, its general Committee, members, or agents or any of them.

[72] Learned counsel for the defendants submits that the words in this clause is clear as to its meaning and import; and that such a clause can effectively operate to deny what would otherwise be a good claim in negligence. In this regard, learned counsel for the defendants draws support from the commentary in the *Law of Torts in Malaysia*, 3rd edn, by Norchaya Talib, where the learned author says:

> E. Exclusion Clause
>
> An alternative defence that is available in a claim in negligence is that of a valid exclusion clause. This defence is not applicable in England but there is no corresponding statutory provision in Malaysia. An exclusion clause which is construed to be clear and unambiguous may effectively deny what would otherwise be a good claim in negligence. Save for statutory provisions which impose a duty on the defendant to compensate the plaintiff for personal injury and death, in all other cases an exclusion clause which excludes liability for the same may be effective. The exclusion clause must be construed to exclude liability for personal injury and death resulting from negligence.

[73] Apart from asserting that this contractual term must be given effect to the on grounds that the deceased was not illiterate and had clearly understood the terms when he signed on that application form, learned counsel for the defendants has not referred to any case authority in support of this contention.

[74] However, the plaintiff takes a contrary position and avers that this clause is invalid and is unenforceable and contrary to public policy. Learned counsel for the plaintiff submits that the exclusion clause:

(a) is void pursuant to s. 29 of the Contracts Act 1950;

(b) not valid as it does not exclude the liability of the defendants in respect of the defendants' negligence; and

(c) is not clear and unambiguous and is therefore ineffective.

[75] Let me discuss these issues in their order. Firstly, learned counsel for the plaintiff submits that the exclusion clause when read as a whole seeks to absolutely restrain the plaintiff from enforcing her legal rights and that would run foul of the statutory provision in s. 29 of the Contracts Act 1950 that reads:

> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Based on the provisions of s. 29 of the Contracts Act, learned counsel argues that since the exclusion clause as construed by the defendants would absolutely restrict the deceased, and his estate's executors and administrators from bringing "any legal proceedings" against the club, this would amount to an absolute bar to one's legal rights and as such the exclusion clause is opposed to public policy and offends against express statutory provisions.

[76] I accept that it is well settled law that parties have freedom to contract. The Federal Court in *The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717; [2014] 6 MLJ 153 in reiterating the principle of freedom to contract observed that:

> It is commonplace for parties to a contract to regulate or modify their rights in the event of breach and the rights of accrual of any cause of action in any way they deem fit. This trite principle is best illustrated in the Privy Council decision of *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1, which was approved by the Federal Court in *Insun Development v. Azali bin Bakar* [1996] 2 MLJ 188 and subsequently in the Court of Appeal case of *NVJ Menon v. The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38.
>
> … …
>
> *Thus as the authorities above have clearly shown, it is trite that parties to a contract are entitled to regulate or modify their rights in the event of breach and the rights of accrual of any cause of action in any way they deem fit*. (emphasis added)

[77] However, this right of freedom to contract is subject to limitations. In *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992] 1 MLJ 185 the issue was the validity of condition 19 in an insurance policy entered into between the parties. Condition 19 read as follows:

> In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

The Federal Court in affirming the judgment of the High Court found that condition 19 was rendered void by the provisions of s. 29 of the Contracts Act 1950 held as follows:

> We are therefore of the opinion that condition 19 of the fire policy contravenes s. 29 of the Contracts Act 1950. The learned judge was therefore correct in holding that condition 19 of the fire policy is void by virtue of the imperative words of s. 29 of the Contracts Act 1950 as it clearly limits the time within which the respondent can enforce his right under s. 6(1)(a) of the Limitation Act 1953.

LC Vohrah J (later FCJ) in delivering the judgment of the Supreme Court in *New Zealand Insurance Co Ltd v. Ong Choon Lin (T/A Syarikat Federal Motor Trading) (supra)* referred to the Indian case of *Pearl Insurance Co v. Atma Ram* where it was held:

> The primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts into which the parties have an unfettered right to enter **provided that they are not opposed to public policy or are not hit by any provision of the law of the land**. (emphasis added)

Thus, it is well settled that the primary duty of a court of law is to uphold the sanctity of contracts which the parties have entered and to enforce promises that the parties have made; provided that they are not opposed to public policy and/or are not prohibited statute.

[78] In keeping with these high authorities, I will now consider whether the exclusion clause is void. The position of the defendants from the outset is that the plaintiff has agreed to waive his right to any possible claim when the deceased joined the club as a member. In fact, the defendants had earlier filed an application (encl. 6) to strike out the plaintiff's claim on similar grounds. In that application the defendants had contended that the plaintiff has no cause of action as the deceased had contractually waived any possible claim in respect of any bodily injury or death arising or following any flight accident. I had dismissed that application (encl. 6) to strike out the claim and proceeded to trial. The defendants did not appeal against that decision. In dismissing that application, it was clear in my mind that the defendants were in fact arguing that the exclusion clause would completely and absolutely bar the plaintiff from any cause of action against the defendants for the death of the deceased. In my opinion, the exclusion clause when construed in the manner advocated by the defendants would be in contravention of s. 29 of the Contracts Act 1950, in that it absolutely restricted the deceased and his estate from enforcing his/their rights under or in respect of the contract. The present action for negligence arises from the contractual nexus and proximity between the second defendant and the deceased, and in that sense would be a right in respect of that contract. Thus, I find that the exclusion clause would be void under s. 29 of the Contracts Act 1950.

[79] Secondly, even if the exclusion clause was not void under s. 29 of the Contracts Act 1950, learned counsel for the plaintiff submits that the exclusion clause must be construed in a way which was intended by both parties when they entered into the contract. Counsel has referred the court to the case of *Mayban Trustees Bhd v. CIMB Bank Bhd & Other Appeals* [2013] 2 CLJ 306; [2012] 2 MLJ 187, where Jeffrey Tan JCA (later FCJ) in construing the applicability of a contractual exclusion clause said:

> Hence, what was agreed must be resolved by the proper construction of the said exclusion clauses (for the general principles of construction of contract, see *Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara* [2007] 1 MLJ 248) which must be construed strictly *contra proferentem* (*Anderson v. Fitzgerald* (1853) 4 HLC 484; (1853) 10 ER 551; *Guardian Assurance Co Ltd v. Condogianis* (1919) 26 CLR 231).
>
> In *Hong Realty (Pte) Ltd v. Chua Keng Mona* [1994] 3 SLR 819, 825, [1994] Karthigesu JA said:
>
> > It is trite law that exemption clauses must be construed strictly and this mean that their application must be restricted to the particular circumstances the parties had in mind at the time they entered into the contract. On any view of the matter the respondent and the appellants could not have intended that the exemption clauses in the contract of bailment would apply when some act had intervened to alter the circumstances in … which the exemption clauses would ordinarily apply.

The Federal Court in *CIMB Bank Bhd v Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1 approved the above *dicta* in the following terms:

> The Court of Appeal opined (and in our view rightly) that the upholding or otherwise of the exemption clause agreed to by the parties depended upon the proper construction of that clause which must be construed strictly …

[80] In contractual interpretation, and particularly in construing a contractual exclusion clause, the approach is an objective one as illustrated by the Federal Court case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 which referred to and accepted the English decision in *Bank of Credit and Commerce International SA (in liq) v. Ali* [2001] 2 WLR 735 where Lord Clyde held, *inter alia*, that:

> … the problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. It is an objective approach which is required and a solution should be found which is both reasonable and realistic.

Similarly, in *Amanah Raya Bhd v. Jerneh Insurance Bhd* [2005] 2 CLJ 393; [2005] 4 MLJ 1 Augustine Paul JCA (later FCJ) opined that:

It may be useful to bear in mind the rules of construction of insurance policies before determining the meaning of the exclusion clause. As Fisher, J said in *Jason v. Batten* (1930) Ltd; *Jason v. British Traders' Insurance Co Ltd* [1969] 1 QB 281 at p. 290:

> A policy of insurance is subject to the same rules of construction as any other written contract. The words used in it must be given their plain, ordinary meaning in the context of the policy looked at as a whole, subject to any special definitions contained in the policy. In case of ambiguity the *contra proferentem* rule will apply but apart from this there is no rule of law which requires me to strain the language of the policy in favour of or against the insured person. (emphasis added.)

[81] Relying on these high authorities, counsel for the plaintiff submits that the true nature and scope of the exclusion clause must first be ascertained, as its proper meaning will play an important and determinative role in ascertaining the liability of the party seeking to rely on it. I agree with that proposition. Learned counsel for the defendants submits that the deceased realising the nature and extent of the risk had by agreement voluntarily waived any possible claim against the second defendant and its servants and/or agents. However, learned counsel for plaintiff contends that it cannot be the true intention of the deceased to completely waive all his legal rights absolutely. This argument by parties would also accord with the defence of *volenti non fit injuria* raised by the defendants and it would be the opportune moment to take up that defence now.

[82] *Volunti non fit injuria* is a Latin maxim which means the plaintiff has consented or voluntarily assumed the risk of injury. In *Lee Geok Theng v. Ngee Tai Hoo & Anor* [2000] 1 LNS 220, the KN Segara J (later JCA) explained the principles on which *volenti non fit injuria* applied thus:

> *Volenti non fit injuria* simply means that to which a man consents cannot be considered an injury. No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. No one can enforce a right which he has voluntarily waived or abandoned. Consent must be real and given without force, fear or fraud. Mere knowledge of a risk does not amount to consent.

The learned judge further stated that when raising the defence, the defendant must plead:

(i) the facts of which the plaintiff was fully appraised, that gave rise to the injury; and

(ii) the plaintiff voluntarily undertook to be responsible for the risk.

This is essential as the general rule in *volenti* requires that the defendant demonstrate that the plaintiff had full knowledge of the nature and extent of the risk which he is alleged to have assumed and had voluntarily consented

to the same (see *Clerk & Lindsell on Torts*, 21st edn, Sweet & Maxwell, at p. 260). In *Jordan Saw Yu Huan v. Low Suan Chuan & Ors* [2012] 1 LNS 1069; [2013] 4 MLJ 137 at 154, Prasad Abraham J (now JCA) had adopted and applied the principles enunciated in *Lee Geok Theng v. Ngee Tai Hoo & Anor (supra)*.

[83] However, in applying the above principles to the present case, it is must be noted that in pleading the *volenti* defence, the defendants stopped short of particularising:

(i) the facts of which the deceased was fully apprised of the risk that gave rise to the injury or death; and

(ii) that the deceased voluntarily undertook to be responsible for the risk.

This by itself would be a fatal flaw in the defendants' plea of *volenti*. In the absence of such particulars in the pleading, it begs the question as to whether it could it be said that the deceased had full knowledge of the risk that he is alleged to have assumed? And it puts the plaintiff at a disadvantage as to the case she has to meet in respect of this defence. The fact that the defendants' defence is devoid of such particulars, is to my mind a clear indication that the second defendant did not fully apprise the deceased of the risk of flying, in particular the risk of death from flying into clouds in a VFR flight condition.

[84] Nevertheless, for sake of completeness, I will consider the defendants' argument in respect of this plea. It is true that the deceased signed a disclaimer/exclusion in his application form where he undertook not to take any action against the club if death or any injury befalls him in the course of his flying activities. Now, is this by itself sufficiently indicative of the fact that the deceased was fully apprised of the risk of flying in any circumstance and that he voluntarily undertook responsibility for all risks that may arise in any circumstance? I do not think so. If at all the deceased could be said to have voluntarily taken on the inherent risk of flying by signing on the disclaimer/exclusion of liability in the application form, then it would only be reasonable to assume that the deceased would have agreed to do so provided that the club and its servants and agents provided a safe and conducive environment for his training and flying activities conducted by the second defendant as a flying club and a flight training school. Surely the deceased would not have agreed to assume risks and dangers of flying using an aircraft that is not airworthy, or when he is cleared to fly in breach of statutory regulations, or when the defendants do not adhere to safety regulations or the operations manual.

[85] Various factors come to mind in considering whether a reasonable person in the deceased's position would have recognised the danger of flying solo on that fateful day, and thus assuming the attendant risks. This is particularly so when considering the fact that:

(a) the oral evidence given by the defendants' witnesses (which contradicts the contemporaneous documentary evidence) that the deceased had completed all the various lessons in the syllabus (P2) before embarking on his solo flight to Ipoh;

(b) despite the unfavourable weather forecast, the first defendant still saw it fit to allow the deceased to fly solo. As a result, it would not be unreasonable to expect the deceased to assume that he would have been able to navigate a solo flight, using VFR, in those weather conditions;

(c) the deceased was merely a student pilot and it was unrealistic to expect him to have dissented to the first defendant who was his superior/instructor.

[86] So, can it then be said that the deceased recognised the danger in embarking on his solo flight on 29 October 2009? I do not think so. On the facts, I am unable to accept the defendants' assertion that the deceased subjectively knew at the time that he signed application form with the disclaimer/exclusion clause that flying in VFR conditions into clouds could cause spatial disorientation that could potentially lead to death, and that he had been fully apprised of such risk. Indeed the evidence shows that the deceased could not have known of such a risk at that material time. On the facts, it was not reasonable to expect the deceased to have known of the danger posed by flying VFR in such adverse conditions. It is precisely for this reason, that the operations manual and regulations impose the onus and responsibility on the trainer/instructor, in this case the first defendant, to ensure that the weather (current or forecast) is suitable for a trainee pilot to fly VFR.

[87] In fact, I would agree with submissions of learned counsel for the plaintiff that instead of training the deceased in accordance to the requirements of the operations manual and the applicable regulations, the first defendant had "enhanced the negligence" of the club in failing to provide a safe environment for the deceased, who was not only a member of the club but a paying student.

[88] In *Oberoi Imperial Hotel v. Tan Kiah Eng* [1992] 1 SLR 380 the Singapore Court of Appeal had, in discussing the *volenti* defence cited with approval the decision of the House of Lords in *Smith v. Baker* [1891-4] All ER Rep 69. The decision concerned whether an employer could rely on the

defence of *volenti non fit injuria* in a situation where the employee knew of the danger involved in the work undertaken but where the employer failed to provide a safe working environment. Lord Herschell initially defined the general rule of the *volenti* defence as:

> When an employee undertakes to do work which is intrisically dangerous notwithstanding that reasonable care has been taken to render it as little dangerous as possible he voluntarily subjects himself to the risks inevitably accompanying it, and, if he suffers, the doctrine of *volenti non fit injuria* is open to his employer in defence to any claim made by him.

Subsequently, the Lord Herschell explained an exception to the general rule:

> **But where a risk to the employee has been created or enhanced by the negligence of the employer in not providing a safe system of work** the mere continuance by the employee in his service with knowledge of the risk does not preclude the employee, if he suffers from such negligence, from recovering in respect of the employer's breach of duty. (emphasis added)

Lord Herschell stated the rationale for that exception, which is relevant here, in the following terms:

> Where, then, a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffers from such negligence, from recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim *volenti non fit injuria* applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong. It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, among them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered. If, then, the employer thus fails in his duty towards the employed, I do not think that because he does not straightaway refuse to continue his service, it is true to say that he is willing that his employer should thus act towards him. I believe it would be contrary to fact to assert that he either invites or assents to the act or default which he complains of as a wrong, and I know of no principle of law which compels the conclusion that the maxim *volenti non fit injuria* becomes applicable.

[89] In *Ting Jie Hoo v. Lian Soon Hing Shipping Co* [1990] 1 CLJ 167; [1990] 3 CLJ (Rep) 267; [1990] 2 MLJ 56 Chong Siew Fai J (later CJSS) referred to *Smith v. Baker (supra)* and stated the duty of an employer to an employee as follows:

> At common law the duty of an employer towards his employees is to take reasonable care for their safety in all the circumstances of the case so as not to expose them to an unnecessary risk. *Wilsons & Clyde Coal Co. Ltd. v. English* [1937] 1 All ER 628; *Smith v. Baker & Sons* [1891] AC 325. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances. *Smith v. Austin Lifts* [1959] 1 All ER 81.

Similarly in *Mat Jusoh Daud v. Sykt Jaya Seberang Takir Sdn Bhd* [1982] CLJ 366; [1982] CLJ (Rep) 562; [1982] 2 MLJ 71, Salleh Abbas FJ (later LP) outlined the duty of an employer towards his workmen as follows:

> The law requires an employer to take reasonable care so to carry on operations as not to subject the persons employed to unnecessary risk, i.e. a duty not to subject the employee to any risk which the employer can reasonably foresee and which he can guard against by any measure, the convenience and expense of which are not entirely disproportionate to the risk involved. This duty was particularised by Lord Wright in *Wilsons and Clyde Coal Cov English* [1938] AC 57, 58 as threefold: (1) the provision of a competent staff of men, (2) adequate material and (3) a proper system and effective supervision.

Although the decision in *Smith v. Baker (supra)* concerned an employer-employee situation, I would agree with submissions of learned counsel for the plaintiff that the principles are equally applicable to the facts of the case herein where the deceased, as a student, was subordinate to the first defendant, as instructor, and the second defendant, as flight training school. The deceased was under the management and control of the defendants. The defendants had a duty to reasonable care to ensure that a student pilot is not exposed any unnecessary and/or avoidable danger or risk, that is to say that the defendants have a duty not to subject the student/trainee to any risk which the defendants can reasonably foresee and which the defendants can guard against by any measure, the convenience and expense of which are not entirely disproportionate to the risk involved.

[90] In the present case, the defendants had failed in this duty and had themselves created or enhanced their negligence by failing to ensure that the deceased was sufficiently trained to embark on his solo flight on 29 October 2009 in adverse weather conditions. Thus, based on the principles enunciated in *Smith v. Baker (supra)*, which principles I have adopted and applied in this case, I find that the *volenti* defence must fail.

[91] Thirdly, in respect of the defendants' contention that at very least the exemption clause would negate liability for negligence, learned counsel for the plaintiff submits that an exemption clause must be expressed clearly and without ambiguity or they will be ineffective. As a party seeking to rely upon an exemption clause bears the burden of proving that the case falls within its provisions, any doubt or ambiguity will be resolved against him and in

favour of the other party. See *Canada Steamship Lines v. The King* [1952] AC 192. Learned counsel for the plaintiff submits that the exclusion clause is ambiguous, as it does not clearly state that liability arising from negligence is excluded.

[92] Now, having weighed and analysed these arguments, I will first of all state that the law does recognise the rights of contracting parties to exclude liability arising from negligence. I do not find any legal bar for a contractual clause for exclusion of liability arising from negligence to be incorporated into a contract. To this I must add a caveat. The limited exception to this rule will now be found in s. 24D(1) of the Consumer Protection Act 1999, which section came into force on 1 February 2011. However, s. 24D(1) is not applicable to the present case as the application form that contains the exemption clause is dated 11 December 2008, thus predating this statutory provision.

[93] The courts had dealt with issues of validity and applicability of exclusion clauses for negligence on many occasions. In *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals (supra)* the Federal Court dealt with the issue of a clause exempting liability arising from gross negligence. Similarly, the Singapore Court of Appeal in *City Car Rentals & Tours Pte Ltd v. Sim Jwee Kiat* [1988] 1 LNS 2; [1988] 2 MLJ 206 had recognised that liability for negligence may be effectively excluded by properly worded contractual exclusion clauses and in this regard referred to paras. 878 and 879 of *Chitty on Contracts* (25th edn), where the following commentary is found:

> Liability for negligence. Liability for negligence may be effectively excluded if words are used which indicate that all damage, however caused, is to be comprehended within the exemption, or which throw the risk upon the plaintiff. If the defendant merely says 'any loss', he is directing attention to the kinds of losses, and not to their cause or origin; so liability for negligence will not necessarily be excluded. But if he says 'however arising' or 'any cause whatever', these words will cover losses by negligence …

Thean J, who delivered judgment in that case, had in construing the applicability of the exemption clause to negligence held as follows:

> Mr. Liew next argued that clause 5(b) on a proper construction did not apply to limit the liability of the defendant for damages for negligence, and he relied on the rule of construction that a provision excluding or limiting liability must be construed strictly and in the absence of clear words the courts will not construe such provision so as to exclude or limit liability for negligence. In this case, the damage was caused by the negligence of the defendant and negligence was not one of the causes specified in clause 5(b) and the provision therein was not wide enough

to cover negligence. Damage caused by negligence, he submitted, was covered by clause 5(c) which applied. In substance, I agree with his submissions.

Mr Liew referred me to various authorities some of which I find extremely helpful. As a starting point, I cannot do better than quote the following passage from the judgment of Lord Greene MR in *Alderslade v. Hendon Laundry, Ltd* [1945] KB 189 at p. 192, where he said:

> … The effect of those authorities can, I think, be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. *Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence* … (emphasis added)

This is in keeping with the pronouncement by the English Court of Appeal in *Price & Co v. The Union Lighterage* [1904] 1 KB 412, as follows:

> That being so, the principle that to exempt the carrier from liability for the consequences of his negligence there must be words that make it clear that the parties intended that there should be such an exemption is applicable to this case, and the learned judge was right in holding that the contract does not exempt the defendants from liability for their own negligence.

In the case of *Canada Steamship Lines Ltd v. The King* [1952] AC 192 the court held at p. 208 as follows:

> It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case.

This principle was accepted and applied in *Premier Hotel Sdn Bhd v. Tang Ling Seng* [1995] 1 LNS 166; [1995] 4 MLJ 229 in the following terms:

> General words of exclusion would not ordinarily protect a contracting party from liability for negligence. To protect him from liability for negligence, the words used must be sufficiently clear, usually either by referring expressly to negligence or by using some such expression as 'however caused'. Here, the exemption clause did not clearly or specifically exempt liability for negligence.

[94] Thus, it is trite law that any attempt to contractually exclude liability for acts of negligence must be expressly and clearly worded. Now, in applying these principles to the facts of this case, I find that the exclusion clause relied on by the defendants is inoperable to exclude liability arising from negligence for the following reasons. The operative words in the aforesaid clause are:

> … should my death or any injury to me occur close to or upon the aircraft, hangars or other premises of the Club, or as a result of flying or otherwise I for myself my executors and administrators hereby undertake not to bring any legal proceedings or to make any claim or demand for or in respect of such death or injury as aforesaid against the said Club, its general Committee, members, or agents or any of them.

The wordings in this clause are too general. Upon a strict construction, the clause does not seem to exclude liability for negligence of the defendants. There is no mention of negligence at all in that clause. The clause merely states that if death were to result from flying he or his estate will not make any claims in respect of that death. Now, there is ambiguity, as death may result from a myriad of reasons whilst flying; including mechanical failure, sudden inclement weather, wilful sabotage, non-airworthy aircraft, negligence of any number of persons connected with the activity of flying; and the important fact is that the clause does not specifically seek to include death that results from the negligence of the defendants. I do not find the clause being specific enough to cover the kind of breach that the plaintiff complains. In such circumstance, the ambiguity must be resolved in proferens against the defendants who seek to rely on the clause. I find support for this view in the decision of the House of Lords in *Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 to the effect that:

> As a matter of construction it may appear that the terms of the exclusion clause are not wide enough to cover the kind of breach which has been committed. Such clauses must be construed strictly and if ambiguous the narrower meaning will be taken.

Similarly, I find that the terms of the present exclusion clause are not wide enough to cover the kind of breach that has occurred in this case, ie, gross negligence on the part of the defendants that had led to the death of the deceased. And in the overall I find that the defendants have failed in the defence.

Loss And Damage Suffered By The Plaintiff

[95] The plaintiff's claim is premised upon ss. 7 and 8 of the Civil Law Act 1956 (CLA). Pursuant to s. 7(2) of CLA, damages awarded shall be to compensate the plaintiff for loss of support of her son together with reasonable expenses incurred as a result of the defendants' negligence.

Special Damages - Expenses Incurred By The Plaintiff

[96] The plaintiff has particularised special damages, as follows:

(i) First, funeral expenses in the sum of RM4,000 which includes the cost of hiring an ambulance to transport the body of the deceased from Lembah Beringin, Perak to Kuala Lumpur. I find that this sum is reasonable considering the distance between Perak and Kuala Lumpur and taking into account other costs involved in a Muslim burial.

(ii) Second, the costs of obtaining the deceased's death certificate in the sum of RM20. This is a fixed sum chargeable by the National Registration Department.

(iii) Third, the cost of extracting the letters of administration, including the extraction of the sijil faraid from the Syariah Courts in the sum of RM7,669.40. The plaintiff adduced documentary evidence to support this head of claim in the form of; (a) the receipt for the sum of RM7,400 issued by the legal firm who was instructed by the plaintiff to apply for the letters of administration; and (b) the receipt dated 25 July 2012 issued by the Syariah Court in the amount of RM269.40.

(iv) Fourth, the loss of the plaintiff's clothing in the sum of RM150. Although no documentary evidence was adduced to support this head of claim, the defendants' solicitors also never challenged the plaintiff's claim under this head. I find that it is reasonably foreseeable that the plaintiff would have been appropriately attired in terms of clothing and footwear while he attended training at the club.

[97] It is pertinent to note that the defendants' never challenged the plaintiff's evidence in regards the claim for special damages. In any event, I find that special damages claimed have been sufficiently proved by the plaintiff. Therefore, I find that the plaintiff is entitled to the sum claimed under this head of damages. Accordingly, I allowed the sum of RM11,839.40 in total as special damages.

Loss Of Support - Section 7 Of The CLA

[98] Loss of support is for all practical purposes translated into financial loss sustained by the dependent: see *Chan Chin Min & Anor v. Lim Yok Eng (Lawful Mother Of Gan Swee Hock, Deceased)* [1994] 3 CLJ 687; [1994] 3 MLJ 233 at 240, SC. The deceased was, at the time of his death, 22 years old and the sole breadwinner of his family. The plaintiff is an illiterate housewife and was, shortly prior to the death of the deceased, widowed by the death of her late husband. The plaintiff testified that following her husband's death, the deceased managed the family mini market business called Syarikat Mariam; and as manager of Syarikat Mariam, the deceased was drawing a salary of RM1,000 per month. According to the plaintiff, apart from modest sums

spent upon him, the deceased's entire earnings were devoted to his household expenses, which include supporting the plaintiff and her daughter, and this would have continued had he remained alive.

[99] The deceased was single at the time of his death. Given the circumstances where he was the only surviving male member in his family, it is reasonable to assume that the deceased's priority was to support his mother and sister; and that he would have continued to support the plaintiff throughout his life. In determining the amount of financial support to be awarded to the plaintiff, I have taken a multiplier of 16 years as provided in s. 7(3)(iv)(d) of the CLA: see the Court of Appeal cases of *Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal* [2004] 1 CLJ 797; [2004] 1 MLJ 525 CA; *Cheng Bee Teik & Ors v. Peter Selvaraj & Anor* [2005] 2 CLJ 839; [2005] 4 MLJ 301 CA.

[100] I have allowed a deduction of 1/3 of the deceased's income for his own living expenses. Thus, I find that the appropriate loss of support should be computed as follows:

(RM666 x 12 months x 16 years) = RM127,872.

Therefore, I allowed the sum of RM127,872.00 as loss of support.

Exemplary Damages

[101] The plaintiff has also claimed exemplary damages in the sum of RM500,000. In *Rookes v. Barnard* [1964] AC 1129 Lord Devlin specified three categories of cases where exemplary damages could be awarded:

(a) where there is 'oppressive, arbitrary or unconstitutional action by the servants of the Government';

(b) where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'; and

(c) where they are expressly authorised by statute.

The decision in *Rookes v. Barnard* was referred to by the Court of Appeal in *Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals* [2015] 2 CLJ 766; [2015] 2 MLJ 607. Learned counsel for the plaintiff submits that exemplary damages should be awarded based on the defendants' conduct, both pre and post action, and has referred the court to the case *Chin Choon v. Chua Jui Meng* [2005] 2 CLJ 569; [2005] 3 MLJ 494, where the Court of Appeal awarded damages in the sum of RM200,000, that includes exemplary damages, against the appellant/defendant therein for his arrogant and unrepentant behaviour. Learned counsel for the plaintiff submits that the instant case would fall under category (b) enunciated in *Rookes v. Barnard (supra)* and seeks an award in the sum of RM500,000 as exemplary damages.

However, having considered the facts, I do not find that the conduct of the defendants is such that it warrants castigation or reprimand of this court by an award of exemplary damages.

General Damages

[102] The plaintiff also led evidence to support the claim for general damages as follows:

(a) Tenancy at an alternative accommodation (Ketapang Villa) for a monthly rental of RM1,000 and for a period of 1 year amounting to a total sum of RM15,850;

(b) Payment of RM700 to Multiling Translators to obtain translation services for trial;

(c) Witness allowances for two subpoena witnesses (SP2 and SP3) in the amount of RM300;

(d) Other household expenses, such as water and electricity charges, which the plaintiff has to now bear due to the loss of support from the deceased.

Learned counsel for the plaintiff submits that a sum of RM30,000 is reasonable as an overall award of general damages to the plaintiff. Having considered the submissions and evidence, I find that the sum of RM30,000 as general damages is reasonable in the circumstance and I allowed this sum as general damages.

I also awarded interest on the judgment sum at the rate of 5% per annum calculated from 29 October 2009.

As the plaintiff claimed cost on an indemnity basis, I instructed the plaintiff to file the Form 107 of the Rules of Court and subsequently having heard arguments, I allowed the sum of RM45,000 on party to party basis as cost to be borne and paid by the defendants to the plaintiff.

Third Party Claim

[103] The third party as owner of the aircraft had leased the aircraft to the second defendant. The defendants with the leave of court issued third party proceedings. The defendants' third party claim is a twofold claim for indemnity, on the basis that it is the third party's responsibility:

(a) to procure insurance coverage for the aircraft; and

(b) to ensure that the aircraft is airworthy at all times.

[104] The third party in its defence pleaded the following:

(a) The third party did procure insurance coverage for the aircraft, but the scope of the policy did not extend to personal injury/death suffered by a trainee pilot in a training session conducted by the defendants; and

(b) Save for daily maintenance which was to be carried out by the second defendant, the third party had ensured that the aircraft was airworthy at all material times.

[105] Third party proceedings are provided for in O. 16 of the Rules of Court 2012. It is trite that the liability of a third party in a third party proceeding is only to be determined upon a finding of liability against the defendant in respect of the main proceedings commenced by a plaintiff. See *Mat Abu Man v. Medical Superintendent, General Hospital, Taiping & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98; [1989] 1 MLJ 226 SC; *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151; [1999] 1 MLJ 657 FC at 662.

[106] Now that I have found liability against the defendants, it would be incumbent upon me to consider the defendants' third party claim. The third party notice issued by the defendants is effectively a claim for indemnity as the defendants contend in the said notice that the third party is to be made liable in full against the plaintiff's claim. In order to sustain a claim for an indemnity, the defendants need to show that an obligation in law for the third party to indemnify the defendants arises by contract or otherwise in law or equity. See *Eastern Shipping Company Ltd v. Quah Beng Kee* [1924] AC 177; *Artic Building And Civil Engineering Sdn Bhd v. Ahmad Zaki Sdn Bhd & Ors* [2009] 1 LNS 403; [2009] 9 MLJ 328.

[107] There is no contract for an indemnity between the defendants and the third party. There is also no statutory obligation requiring the third party to indemnify the defendants, and in any event the defendants have not alleged that such an obligation exists. That leaves the question of whether there exists in law or equity a duty or relationship between the defendants and the third party that would give rise to any legal or equitable obligation to indemnify. In this respect, regard would have to be given to the contractual relationship between the second defendant and the third party as lessee and lessor of the aircraft, and in this respect the contractual obligations of the third party would have to be construed in order to determine if the third party had breached any such contractual term or obligation.

[108] The defendants, particularly the second defendant, contends that the third party had a contractual obligation to procure insurance coverage to cover injury and/or death of trainee pilots, such as the deceased, that arises from the use of the aircraft. The third party contends otherwise.

[109] It is common ground between the second defendant and the third party that there is no duly executed written contract between them. There was a series of negotiations between the second defendant and the third party wherein the third party had made known its position that it would not be

procuring insurance coverage for personal injury to trainee pilots of the second defendant, and that it would be the responsibility of second defendant to procure such a policy. Following these negotiations, a draft lease agreement was prepared and it was forwarded to the second defendant for execution. The second defendant whist not having executed the draft agreement had nevertheless taken delivery of the aircraft, and started having use of the same. In this regard, learned counsel has referred to s. 8 of the Contracts Act 1950 that provides:

> Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

In *EMS Bowe (M) Sdn Bhd v. KFC Holdings (M) Bhd & Anor* [1999] 6 CLJ 513; [1999] 4 MLJ 424, the court held as follows:

> It was the contention of the first defendant that a draft letter of award does not constitute a concluded and binding agreement. It is but a draft until it is perfected. In support the defendants relied on *Teoh Soon Kok t/a TSK Supplies Trading v. MBf Finance Bhd* [1996] 2 AMR 1838. In that case the court held, and rightly so, that a draft judgment did not have the force of law and that it needed to be perfected before being regarded as a judgment of the court. The first defendant urged me to apply the same rationale to a draft of any document like the draft of this letter of award. I cannot accept that. The decision in *Teoh Soon Kok* is based on the principle that until perfected, the terms of an order of the court cannot be enforced either by execution or any other mode of enforcement. Whereas a draft agreement or a draft letter of offer whilst notionally being a draft, yet if it is acted upon with the knowledge or concurrence of the other party or its agent, it can no longer be construed as a draft. The draft is therefore converted into a written agreement, based on the fact that one party had acted upon the terms, with the knowledge and concurrence of the other party.

Similar pronouncement of the law was made by the High Court in *Woon Yoke Lin (Berniaga sebagai Syarikat Ceritaku) v. United Estates Projects Berhad* (1998) 4 AMR 4052. The Federal Court in *Lau Sieng Nguong v. Hap Shing Company Ltd* [1969] 1 LNS 80; [1969] 1 MLJ 190:

> It is clear law that where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement.

[110] In the present case, when the entire series of correspondence between the parties and the conduct of parties is considered, I would agree with the contention of counsel for the third party that whilst the lease agreement was never executed, parties had nevertheless proceeded on terms of the last concluded contractual terms between the parties immediately prior to or

upon the second defendant taking delivery of the aircraft, and those terms are contained in the final draft lease agreement. My finding is further fortified by the fact that the third party had *vide* letter dated 19 March 2009 requested the second defendant to execute the lease agreement within seven days from the acceptance of delivery of the aircraft, failing which the agreement as per the terms of the final draft shall be deemed to be in force with immediate effect. The second defendant did not sign the agreement within the seven days, or at any date subsequent to it. If the second defendant was not agreeable to the terms of the draft agreement, then the second defendant ought to have rejected delivery of the aircraft. Instead, not only did the second defendant accept delivery but used the aircraft for its intended purpose. It is trite that, the act of acceptance of a contract may be either by words or by conduct or it may be partly by words and partly by conduct. See *Brogden v. Metropolitan Railway Co* (1877) 2 App Cas 666 which was referred to by the Court of Appeal in *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya & Ors* [2001] 3 CLJ 864; [2001] 1 MLJ 49. Thus, in law the second defendant would by the series of correspondence and its conduct be deemed to have accepted the terms of contract as contained in the final draft lease agreement and therefore a binding agreement in those terms would be in force. The second defendant and the third party would be bound by the terms of the final draft lease agreement. In this regard, I would hold that though the final draft agreement was not executed, the terms of the final draft agreement would bind the parties and the second defendant by its conduct of having taken delivery of the aircraft would be deemed to have accepted the contractual terms in the draft agreement.

[111] Now, in that final draft lease agreement, cl. 6.1 and 6.2 concerning insurance reads as follows:

> 6.1 The said Aircraft shall at all times have hull insurance coverage at the cost and expense of CTRM AV (Third Party).
>
> 6.2 Notwithstanding Clause 6.1 aforesaid, insurance coverage for Personal Accident, Hangars Keepers Liability and Third Party Liability shall be maintained by RSFC (2nd Defendant). Should RSFC (2nd Defendant) require CTRM AV (Third Party) to purchase insurance for Personal Accident and Third Party Liability a monthly fee of Ringgit Malaysia Seven Hundred and Fifty only (RM750.00) shall be charged accordingly.

The evidence shows that during the course of negotiations on the terms of the lease agreement the second defendant did not object to cl. 6.2. In fact the third party produced in evidence three progressive draft agreements that were sent by the third party to the second defendant, two were sent under cover of letters dated 18 February 2009 and 2 April 2009 and the third *via* email on 15 June 2009. In all these draft agreements, which were going back and forth between the parties, cl. 6.2 remained the same. The second defendant did not seek any amendment to cl. 6.2 nor did it indicate its disapproval. In the premise, cl. 6.2 stands as a valid and binding contractual term.

[112] Now, cl. 6.2 is very clear in its wording. Clause 6.2 states that the primary responsibility to procure insurance to cover personal injury is on the second defendant. Clause 6.2 also provides that in the event that the second defendant wants the third party to procure insurance to cover personal injury risk, such as covering injury or death to trainee pilots, like the deceased, who use the aircraft for training purposes, then the second defendant would have to make a request to the third party and pay a monthly charge of RM750. There is no evidence of the second defendant ever having made a request to the third party to procure such insurance cover, nor is there any evidence of the second defendant agreeing to pay or indeed paying the sum of RM750 every month. In fact DW4 admitted in cross-examination that the second defendant never paid the monthly sum of RM750 for such insurance coverage. It is thus clear that the second defendant has the contractual obligation to procure insurance coverage to cover risk of personal injury or death suffered by trainee pilots during training conducted by the defendants. The second defendant having failed to fulfil that contractual obligation is now attempting to pass on that liability to the third party. And this court cannot countenance that.

[113] In respect of the second limb of the third party claim, ie, in regards the issue of airworthiness of the aircraft, this had become non-issue as the plaintiff's counsel did not pursue this in his closing submissions. Accordingly, the defendants too abandoned this issue. Therefore, nothing turns on this. In any event there was ample evidence adduced by the third party that the aircraft was certified airworthy. There is no correlation between the aircraft's airworthiness and the crash. In fact the accident investigation report (P1) concludes that the air crash was not caused by the built or airworthiness of the aircraft.

[114] Therefore, in conclusion I find that the defendants have failed to establish their case against the third party for indemnity and as such I dismissed the third party claim with cost to be borne by the defendants. Having heard parties on the issue of cost, I awarded the sum of RM15,000 as cost for the trial and the sum of RM2,500 for each of the applications in encls. 44 and 47.

Orders accordingly.